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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

CARTER G. PHILLIPS *
JAMES F. BENDERNAGEL, JR.
DAVID L. LAWSON
SIDLEY & AUSTIN
1722 I Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Petitioner

* Counsel of Record

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QUESTION PRESENTED

Whether Congress has authorized federal courts in making property rights determinations concerning federally-regulated bankrupts to preempt the established state trust and property law called for by the Bankruptcy Code in favor of newly-created federal common law designed to further generalized policy interests unrelated to bankruptcy.

LIST OF PARTIES AND RULE 29.1 LIST

The caption of the decision below (App. 1a) contains the names of the parties.

The Creditors Committee is the exclusive, official body appointed by the United States Trustee pursuant to Section 1102 of the Bankruptcy Code, 11 U.S.C. § 1102, to represent the interests of all of the unsecured creditors of Columbia Gas Transmission Corporation.*

A substantial number of these unsecured creditors are publicly-owned corporations or affiliates or subsidiaries of publicly-owned corporations. According to the Creditors Committee's records, the twenty largest publicly owned creditors are the following:

Ashland Exploration, Inc.
(subsidiary of Ashland Oil, Inc.)

Atlas Resources Inc.

Columbia Gas of Ohio Inc.
(subsidiary of The Columbia Gas System, Inc.)

The Columbia Gas System, Inc.

Columbia Natural Resources Inc.
(subsidiary of The Columbia Gas System, Inc.)

Consolidation Coal Co.
(division of E.I. DuPont de Nemours & Co.)

Energy Development Corporation
(subsidiary of Enterprise Diversified Holdings Incorporated, subsidiary of Public Service Enterprise Group Inc.)

Equitable Resources Energy Company
(subsidiary of Equitable Resources, Inc.)

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* These bankruptcy proceedings are currently pending in the United States Bankruptcy Court for the District of Delaware. *See In re The Columbia Gas System Inc. and Columbia Gas Transmission Corporation,* Case Nos. 91-803 *et al.* (Bankr. D. Del.).

Exxon Company, U.S.A.
(division of Exxon Corp.)

Kentucky West Virginia Gas Co.
(subsidiary of Equitable Resources, Inc.)

Meridian Oil Production, Inc.
(subsidiary of Burlington Resources, Inc.)

Mountaineer Gas Company
(subsidiary of Allegheny & Western Energy Corp.)

Phillips Petroleum Co.

Phillips Production Co.

Samedan Oil Corporation
(subsidiary of Noble Affiliates, Inc.)

Southeastern Gas Co.
(subsidiary of Northern Engineering Corp.,
subsidiary of DWG Corp.)

Texas Eastern Transmission Co.
(subsidiary of Texas Eastern,
subsidiary of Panhandle Eastern Corp.)

Union Pacific Resources Corporation
(subsidiary of Union Pacific Corp.)

Unocal Exploration Corporation
(subsidiary of Unocal Corp.)

Xplor Corporation

According to the Creditors Committee's records, more than 750 unsecured creditors assert claims of $1 million or more, and more than 2000 assert claims of $100,000 or more.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 29.1 LIST	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	8
CONCLUSION	20

TABLE OF AUTHORITIES

CASES — Page

In re Ann Arbor R.R., 623 F.2d 480 (6th Cir. 1980) 8, 12, 17
Associated Gas Distribs. v. *FERC*, 893 F.2d 349 (D.C. Cir. 1989), *cert. denied*, 111 S. Ct. 277 (1990) 5
Begier v. *IRS*, 496 U.S. 53 (1990) 2, 17
Boyle v. *United Technologies Corp.*, 487 U.S. 500 (1988) 14
Butner v. *United States*, 440 U.S. 48 (1979) 8
Clearfield Trust Co. v. *United States*, 318 U.S. 363 (1943) 11
Columbia Gas Transmission Corp. v. *Exclusive Natural Gas Storage Easement*, 962 F.2d 1192 (6th Cir.), *cert. denied*, 113 S. Ct. 659 (1992) 14
Elliott v. *Bumb*, 356 F.2d 749 (9th Cir.), *cert. denied*, 385 U.S. 829 (1966) 18
Erie R.R. v. *Tompkins*, 304 U.S. 64 (1938) 14
Hillsborough County v. *Automated Medical Labs., Inc.*, 471 U.S. 707 (1985) 9
In re Iowa R.R., 840 F.2d 535 (7th Cir.), *cert. denied*, 488 U.S. 899 (1988) 8, 10, 12, 13, 19
Kamen v. *Kemper Fin. Servs., Inc.*, 111 S. Ct. 1711 (1991) 9, 14, 15
In re Lehigh & New England Ry., 657 F.2d 570 (3d Cir. 1981) 11, 12, 17
Milwaukee v. *Illinois*, 451 U.S. 304 (1981) 14
Miree v. *DeKalb County*, 433 U.S. 25 (1977) 12
Missouri Pac. R.R. v. *Escanaba & Lake Superior R.R.*, 897 F.2d 210 (6th Cir. 1990) 9, 13
In re Penn Cent. Transp. Co., 486 F.2d 519 (3d Cir. 1973) (en banc), *cert. denied*, 415 U.S. 990 (1974) 11
Puerto Rico Dep't of Consumer Affairs v. *Isla Petroleum Corp.*, 485 U.S. 495 (1988) 15
Smith v. *Williams*, 698 F.2d 611 (3d Cir. 1983) 12
Sunray Mid-Continent Oil Co. v. *FPC*, 364 U.S. 137 (1960) 16
Texas Indus., Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981) 9

TABLE OF AUTHORITIES—Continued

	Page
Transamerican Natural Gas Corp., 41 FERC ¶ 62,206 (1987)	15
United States v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979)	9, 15
United States v. *Texas*, 113 S. Ct. 1631 (1993)	9, 15
STATUTES	
7 U.S.C. § 499e(c) (2)	10
Bankruptcy Code, 11 U.S.C. § 101 *et seq.*	2
§ 362	3
§ 506	2
§ 507	2, 10
§ 541	2, 3
§ 1101 *et seq.*	6
Natural Gas Act, 15 U.S.C. § 717 *et seq.*	4
26 U.S.C. § 7501	10
OTHER AUTHORITIES	
Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 883 (1986)	14
Restatement (Second) of Trusts (1959)	5
FERC Order No. 636-A, 57 Fed. Reg. 36,128 (1992)	16

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PETITION FOR A WRIT OF CERTIORARI

The Official Committee of Unsecured Creditors of Columbia Gas Transmission Corporation ("Creditors Committee") hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-74a) is reported at 997 F.2d 1039. The opinion of the district court (App. 75a-122a) is not reported. The opinion of the bankruptcy court (App. 123a-144a) is reported at 136 B.R. 930.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1993. The order of the court of appeals denying the Creditors Committee's petition for rehearing was entered on August 6, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 541 of the Bankruptcy Code, 11 U.S.C. § 541, provides in pertinent part:

> (a) The commencement of a [bankruptcy] case . . . creates an estate. Such an estate is comprised of . . . all legal or equitable interests of the debtor in property as of the commencement of the case . . . .
>
> (d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate . . . only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

STATEMENT OF THE CASE

1. *Bankruptcy Background.* Respondent Columbia Gas Transmission Corporation ("Debtor") is bankrupt and owes billions of dollars to thousands of creditors. Congress in the Bankruptcy Code carefully crafted the priority of payment of claims against the property of bankrupts. See 11 U.S.C. § 101 *et seq.* That statutory framework serves Congress' longstanding policy of "[e]quality of distribution among creditors," *Begier* v. *IRS*, 496 U.S. 53, 58 (1990), while at the same time granting payment priority to certain preferred claims, including claims of the United States. See, *e.g.*, 11 U.S.C. §§ 506, 507. The Code implements those congressional policies by immediately transferring to a bankruptcy estate "all legal or equitable interests of the debtor in property," 11 U.S.C.

§ 541(a)(1), and then automatically staying the efforts of all creditors to collect from the estate the amounts owed them, until a plan of reorganization that recognizes statutory priorities and deals fairly with the claims of all creditors has been confirmed by the bankruptcy court. 11 U.S.C. § 362.

All creditors prefer, of course, to be paid immediately and in full, rather than on a pro-rata basis with their peers. This case involves the Debtor's efforts immediately to pay in full more than $160 million in obligations to respondent customers, many of whom are also its corporate affiliates.[1] Although the Bankruptcy Code forbids such preferential transfers of property of the bankruptcy estate, respondents contend that the Debtor holds the disputed funds in "trust." Property held by a bankrupt in *trust* for another does not become part of the bankruptcy estate, and therefore is not affected by the automatic stay against collection efforts. 11 U.S.C. § 541(d). Indeed, a successful trust claimant is entitled to payment even before secured creditors and priority claimants such as the United States, which here asserts a *$600 million* priority claim against the Debtor.[2]

Because of the obvious advantage attached to trust beneficiary status, "trust" claims are common in bankruptcy and assessing such claims is a recurring and significant aspect of the business of federal courts sitting in bankruptcy. The courts of appeals, however, have split on the critical issue raised here, namely, what body of

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[1] The Debtor is a wholly-owned subsidiary of The Columbia Gas System Inc. ("CG"), which also has filed a petition for bankruptcy. Six of the Debtor's customers, including several of the Debtor's largest customers, are also wholly-owned subsidiaries of CG. These affiliated customers are Columbia Gas of Kentucky, Inc., Columbia Gas of Ohio, Inc., Commonwealth Gas Services, Columbia Gas of Maryland, Inc., Columbia Gas of New York, Inc., and Columbia Gas of Pennsylvania, Inc.

[2] The claim of the United States is asserted by the Internal Revenue Service, a frequent creditor in bankruptcies.

law—established state law or newly-created federal common law—governs such trust claims where, as in this case, the bankrupt is regulated by the federal government pursuant to a nonbankruptcy federal statute.

2. *The Disputed Funds.* The Debtor operates a "downstream" gas pipeline comprised of facilities that reach into gas-consuming states, but not many gas-producing states. The Debtor buys gas and services from "upstream" pipelines located in gas-producing states, and resells them to its customers, state-regulated gas distribution companies.

The "trust" claims at issue in this case relate to certain pre-bankruptcy "refund" obligations of the Debtor to its customers. Although pipeline customers pay for their purchases according to contract, the rates charged are generally subject to later review by the Federal Energy Regulatory Commission ("FERC") pursuant to the Natural Gas Act, 15 U.S.C. § 717 *et seq.* ("NGA"). If the FERC determines that the rates charged were too high, it may order refunds. See 15 U.S.C. § 717c(e).[3]

The specific funds that respondents contend the Debtor holds in "trust" are refunds that the Debtor received as a customer of its upstream pipeline suppliers. When the Debtor receives such refunds, it may, as here, owe refunds of like amounts to its own customers, because the service agreements between the Debtor and its customers generally tie the Debtor's rates to the *costs* it incurs in providing service, including charges from upstream pipelines.[4]

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[3] Specifically, FERC is empowered to ensure that rates charged by "natural gas companies," such as the Debtor, do not exceed "just and reasonable" levels. *See* 15 U.S.C. § 717c.

[4] Most of the refunds at issue here relate to upstream pipelines' costs associated with "take-or-pay" contract provisions that obli-

Importantly, no party disputes the Debtor's underlying contractual and legal refund *obligations* to its customers. On the contrary, under the NGA, those *obligations* must be respected, and under the Bankruptcy Code, the customers are afforded substantial rights to *payment* of their claims. Only trust property, however, is exempt from the Bankruptcy Code distribution scheme and its principle of equal distribution among creditors. Furthermore, as respondents concede, under traditional state law property and trust principles, the funds at issue here indisputably are property of the Debtor's bankruptcy estate.[5] Thus, the only

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gated them periodicially to pay for certain quantities of gas whether or not they actually took delivery of those quantities. In 1987, the FERC ruled that pipelines could bill their customers a portion of these costs of maintaining gas inventory on the basis of the customers' historical purchase decisions—*i.e.*, customers who had reduced their purchases, and who were therefore more responsible for take-or-pay costs, would be required to pay more of the take-or-pay bill. As a customer of upstream pipelines, the Debtor was charged such costs, and it subsequently billed its customers a like amount pursuant to its contracts with them. The FERC orders were vacated by the D.C. Circuit (*not* because the charges were deemed excessive or unreasonable, but because this after-the-fact allocation violated the technical prohibition against "retroactive ratemaking," *see Associated Gas Distribs.* v. *FERC*, 893 F.2d 349 (D.C. Cir. 1989), *cert. denied*, 111 S. Ct. 277 (1990)). Under revised allocation methodologies approved by the FERC on remand, the Debtor's share of take-or-pay costs decreased significantly, and pursuant to its contracts with its customers and the FERC refund orders, the Debtor owes its customers refunds.

[5] Traditional state law trust principles focus on the intent of the parties as determined by objective indicia that signal the trust relationship to other parties. *See* Restatement (Second) of Trusts § 23 (1959) (a trust is created "only if the settlor properly manifests an intention to create a trust"). Accordingly, courts generally look to contractual expressions of intent, restrictions on the use of the funds, *id.* at § 12 comment g, segregation of the funds, *id.* at § 179 comment b, and the absence of any provision for the payment of interest, *id.* at § 12 comment g, in distinguishing a trust relationship from an ordinary debtor-creditor relationship. In this

issue is whether, as the court below held, some undefined federal policy "interest" unrelated to bankruptcy justifies preemption of otherwise applicable state law and entitles the customers to preferential payment ahead of the thousands of other creditors, including the United States, who have equally valid claims to the Debtor's property.

3. *The Proceedings Below.* On July 31, 1991, the Debtor filed with the United States Bankruptcy Court for the District of Delaware a petition for voluntary bankruptcy under Chapter 11 of the Bankruptcy Code. See 11 U.S.C. § 1101 *et seq.* Less than a month later, the Debtor sought authority preferentially to pay its customers' pre-bankruptcy refund claims totalling approximately $160 million. The bankruptcy court, creating and applying a new federal common law of "trusts," authorized the Debtor to disburse to its customers approximately $140 million as "trust" funds.[6] The bankruptcy court's decision to pre-empt established state law rested solely on the Debtor's character as a regulated entity, the existence of a regulatory statute and agency, and a perceived need for "uniformity."

The United States District Court for the District of Delaware reversed, rejecting respondents' claim of pre-emption. The district court reasoned that state law should apply where, as here

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case, it is undisputed that there were *no* contractual expressions of intent to create a fiduciary trust relationship; the Debtor was contractually and legally free to and did use the disputed funds *in any manner it saw fit*, including, *inter alia*, to service debt, to pay operating expenses, and to pay dividends; the Debtor made *no* attempt to segregate the disputed funds from its general accounts; and the Debtor is fully obligated to pay interest on its refund obligations. In sum, the respondents did *nothing* that could have alerted other creditors that the funds ostensibly in the Debtor's control were held in trust for its customers.

[6] Although the bankruptcy court held that *all* of the disputed funds were "trust" funds it found that approximately $20 million had been irretrievably disbursed prior to bankruptcy. App. 139a.

> we have two federal statutes, one of which (the NGA) is entirely silent on the issue of applicable law (trusts and bankruptcy), while the other (the Bankruptcy Code) directs review according to traditional state law principles. With regard to each statute, Congress obviously has the power of clarification; we read the silence of Congress in the NGA as supporting the application of state law principles. Furthermore, where there is a conflict between the Bankruptcy Code and a competing statute, the Code, generally, takes precedence. *NLRB* v. *Bildisco and Bildisco*, 465 U.S. 513, 532 (1984). . . .

App. 100a-101a. Turning to applicable state law, the court found *no* evidence of a trust between the Debtor and its customers, *id.* at 103a, a finding which respondents did not challenge on appeal.

A divided panel of the Third Circuit reversed the district court and again authorized the Debtor to distribute the disputed funds as "trust" funds. *Id.* at 38a. The court of appeals held that, because the Bankruptcy Code defines "property" of the estate, trust determinations in bankruptcy *necessarily* are governed by federal law. *Id.* at 47a. The only real issue, according to the court, was whether it should "fashion a uniform federal common law rule or adopt state law as the federal rule of decision." *Id.* Reasoning that the application of "state law to determine [the Debtor's] property rights in the refunds would frustrate the Natural Gas Act's central purpose," *id.* at 49a, the court of appeals adopted a result-oriented federal common law "rule" completely unmoored from any traditional trust principles. *See id.* at 71a ("nothing indicates one way or the other whether the parties intended to create a trust" and "[n]one of the traditional indicia of a trust relationship . . . [was] present") (Nygaard, J., dissenting).[7]

[7] On August 6, 1993, the Third Circuit, with two judges dissenting, denied the Creditors Committee's request for rehearing and suggestion for rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

The decision below has greatly exacerbated the existing conflict among the circuits with regard to the circumstances, if any, under which Congress has authorized federal courts to preempt the established state property and trust law called for by the Bankruptcy Code in favor of newly-created federal common law designed to further policy interests unrelated to bankruptcy. This Court has long recognized that "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." See *Butner* v. *United States*, 440 U.S. 48, 54 (1979).[8] *Butner* left open the possibility, however, that federal law might apply where an "identifiable" federal interest *"requires* a different result." *Id.* at 55 (emphasis added).

In the wake of this Court's decision to leave open the possibility of preemption, the courts of appeals have taken widely diverging approaches to the appropriate scope of federal common law preemption. The Seventh Circuit has narrowly construed the *Butner* dicta consistent with this Court's federal common law jurisprudence—*i.e.*, preemption may occur only upon demonstration of a "substantial conflict" between state law and a "concrete federal interest" that is "*clearly* important." See *In re Iowa R.R.*, 840 F.2d 535, 540-42 (7th Cir.) (emphasis in original), *cert. denied*, 488 U.S. 899 (1988). In the Sixth Circuit, by contrast, an *ad hoc* judicial finding that a particular substantive result furthers a federal "interest" as nebulous as fostering "a unified national rail system" justifies abandoning state law in favor of federal common law expressly designed to achieve that result. See *In re Ann Arbor R.R.*, 623 F.2d 480 (6th Cir. 1980). And in the Third Circuit, the federal common law exception has now completely swal-

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[8] *Butner* rejected the Third Circuit's federal common law approach to analyzing whether a security interest in a bankrupt's property extends to rents and profits derived from the property.

lowed the state law rule—the decision below holds that federal law governs *all* trust determinations under § 541 (d) of the Bankruptcy Code. Indeed, all that remains of the choice of law issue in the Third Circuit is whether, in a particular case, the *federal* rule of decision should be informed by state law principles. See App. 47a. Thus, it is beyond dispute that the well-reasoned decision of the Seventh Circuit in *"Iowa R.R.* is a complete rejection of" the Third Circuit's expansive and unprecedented federal common law approach, *Missouri Pac. R.R. Co.* v. *Escanaba & Lake Superior R.R.*, 897 F.2d 210 (6th Cir. 1990), and this case presents a proper vehicle for resolving that circuit split.

The decision below also is flatly inconsistent with numerous decisions of this Court recognizing that widespread federal common law preemption threatens core principles of federalism and raises serious democratic process concerns. In contrast to the decision below, this Court has carefully limited the scope and content of federal common law. See, *e.g., United States v. Texas,* 113 S.Ct. 1631 (1993). Specifically, the decision below is inconsistent with prior decisions of this Court (a) narrowly confining the scope of federal common law, see, *e.g., Texas Indus., Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 641 (1981), (b) cautioning that even in those rare instances in which federal common law is appropriate, federal courts generally should incorporate state law as the federal rule of decision, see, *e.g., United States* v. *Kimbell Foods, Inc.,* 440 U.S. 715, 728 (1979); *Kamen* v. *Kemper Fin. Servs., Inc.,* 111 S. Ct. 1711, 1717 (1991), and (c) refusing to find preemption in fields, such as property and trust law, that traditionally have been regulated by the states "unless that was the clear and manifest purpose of Congress," *Hillsborough County* v. *Automated Medical Labs., Inc.,* 471 U.S. 707, 715 (1985) (internal quotations omitted).

Because numerous industries now are subject to federal regulation, resolving the issue of what law governs rights

in the property of federally-regulated bankrupts is of tremendous practical importance. The divergence between the decision below, which sanctions the creation of federal common law property rights on an essentially *ad hoc* basis, and the prior decisions of the Sixth and Seventh Circuits, has left the nation's creditors generally helpless to anticipate the extent of a federally regulated debtor's assets. See *In re Iowa R.R.*, 840 F.2d at 544. Moreover, the court of appeals' approach, under which an ordinary creditor is transformed into a "trust" beneficiary whenever some federal policy interest unrelated to bankruptcy might be advanced, invites wholesale departure from Congress' policy of equal distribution and the exhaustive payment priority scheme established in the Bankruptcy Code in favor of *ad hoc* judicial priority determinations. Indeed, the decision below renders meaningless Congress' careful decisions in numerous other settings expressly granting certain entities priority claims to the assets of regulated debtors.[9]

Finally, the approach of the court of appeals prejudices, among others, the United States, which asserts a $600 million priority claim against the Debtor. Indeed, the broad holding of the court below threatens the United States' statutory priority in countless future bankruptcies. Accordingly, it is reasonable to expect that the United States would urge the Court to decide this issue—and thereby determine whether judicial policy determinations may overrule the express statutory priorities that the United States enjoys with respect to certain claims, see 11 U.S.C. § 507(a)(7) & (8)—if its views were solicited.[10]

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[9] *See, e.g.*, 7 U.S.C. § 499e(c)(2) ("[p]erishable agricultural commodities received by [a regulated broker] shall be held by such [broker] in trust for the benefit of all unpaid suppliers"); 26 U.S.C. § 7501 (federal taxes withheld by employers are "held to be a special fund in trust for the United States").

[10] Department of Justice officials responsible for Internal Revenue Service litigation authorized petitioner to note the United States'

1. The Third Circuit first addressed the issue of the appropriate body of law to apply in assessing trust claims against a federally-regulated bankrupt in *In re Penn Cent. Transp. Co.*, 486 F.2d 519 (3d Cir. 1973) (en banc), *cert. denied*, 415 U.S. 990 (1974). In that case, "interline" railroads sought trust status for claims to a portion of a bankrupt railroad's collections for long-haul shipments that had used the facilities of both the bankrupt and the interlines. Without explanation, the court analyzed the issue under federal law. This new federal common law of trusts, however, departed only slightly from traditional state law principles. Thus, the federal analysis focused on contractual expressions of intent to create a trust, the lack of any provision for the payment of interest, and the interline railroads' ability to restrict the debtor's use of the disputed funds. See *Penn Central*, 486 F.2d at 524-27. Indeed, the court noted the presence of all but one of the traditional state law indicia of trust. *Id.* at 527 ("[w]e perceive no need to announce an entirely new and necessarily result-oriented rule of law," because "recognized trust and pragmatic considerations . . . are appropriate to any industry").

Eight years later in another interline railroad case, the Third Circuit belatedly provided the rationale for the approach adopted in *Penn Central*. See *In re Lehigh & New England Ry.*, 657 F.2d 570 (3d Cir. 1981). Citing this Court's decision in *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943), the court of appeals listed

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support of petitioner's position in briefs before the District Court. And the United States recently filed an objection to a subsequent request by the Debtor preferentially to pay additional customer refunds (App. 183a-186a). Moreover, at the request of the Debtor's customers, the Federal Energy Regulatory Commission filed an *amicus* brief with the court of appeals supporting respondents' position. Accordingly, in light of the clear importance of the issues raised in this case to various departments and agencies of the United States, it seems likely that the United States would urge this Court's review of the decision below.

four factors to justify federal common law preemption: (1) "the funds in question arose out of railroad operations in interstate commerce, the regulation of which is under the exclusive control of Congress," (2) "Congressional concern with the establishment and maintenance of a viable national rail system has been expressed in . . . the Interstate Commerce Act," (3) "by establishing the Interstate Commerce Commission, Congress sought to regulate interstate commerce by rail," and (4) "it is manifest that uniformity is required." *Lehigh,* 657 F.2d at 575. Of course, in every case in which an activity or industry is subject to federal regulation, there exists a federal regulatory statute and a federal regulatory agency, and by definition one reason for national regulation is always uniformity.[11] Thus, in the Third Circuit the mere existence of federal regulation suffices to preempt state trust and property law. Notwithstanding this extremely broad role the *Lehigh* court scripted for federal common law in making property rights determinations in bankruptcy, however, that court again turned to traditional state-law principles to give content to the federal rule of decision. *Id.* at 578.[12]

In 1988, the Seventh Circuit expressly rejected *Penn Central* and its federal common-law progeny and held that *state* law should govern claims against a federally-regulated bankrupt railroad. *In re Iowa R.R.*, 840 F.2d 535. Citing this court's decision in *Miree* v. *DeKalb County,* 433 U.S. 25 (1977), Judge Easterbrook, writing for the Seventh Circuit, reasoned that the mere fact that "the dispute involves the interstate transportation network is not enough" to justify preempting state law. *In re Iowa R.R.* at 540. "[O]nly a demonstration of a *substantial* conflict

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[11] Ironically, the Third Circuit has since recognized that *state* trust law *is,* for all practical purposes, a nationally uniform body of law. *See, e.g., Smith v. Williams,* 698 F.2d 611, 614 (3d Cir. 1983).

[12] The Sixth Circuit adopted a similar approach in *In re Ann Arbor R.R.*, 623 F.2d 480 (6th Cir. 1980).

between state law and the achievement of an objective defined by federal law would support a conclusion that federal law controls." *Id.* (emphasis added). Furthermore, [e]xtensive regulation is no substitute for a conflict." *Id.* (citing *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355 (1986)). Judge Easterbrook concluded that favoring certain creditors of a brankrupt in the hopes of furthering generalized federal policy interests unrelated to bankruptcy, such as "the preservation of a national transportation system," is "not so *clearly* important that a federal court may create federal common law to trump the state law that governs competing claims to a debtor's funds." *Id.* at 542 (emphasis in original).

"Iowa R.R. is a complete rejection of *Penn Central . . . ." Missouri Pac. R.R.*, 897 F.2d at 213. That this Court chose *not* to review the issue at the time, however, is not surprising. First, the Third Circuit's federal common law approach had not been widely adopted nor extended beyond the interline railroad context. Second, in light of the powerful reasoning of the Seventh Circuit and the corresponding lack of analysis in the prior Third Circuit opinions, it was reasonable to expect that the Seventh Circuit approach might ultimately prevail. Finally, and most importantly, while the circuits were clearly split on the choice of law question, the Third and Sixth Circuits' consistent adoption of traditional state law trust principles as the federal rules of decision minimized the potential harm arising out of the decisional conflict.

These reasons for delaying review of this important issue and resolving the circuit split have disappeared with the decision of the court of appeals here. First, the court of appeals extended the application of federal trust law well beyond the narrow interline trust context. It is now available in all bankruptcies of federally regulated entities. Second, the court greatly expanded the role of federal common law to *all* trust determinations pursuant to § 541(d). In the Third Circuit, the existence and na-

ture of regulation now determines only whether federal common law will be informed by state law principles. And finding such regulation here, the court of appeals completely disregarded traditional state law trust principles and created result-oriented federal common law principles out of whole cloth.[13] Compare *Columbia Gas Transmission Corp.* v. *Exclusive Natural Gas Storage Easement*, 962 F.2d 1192 (6th Cir.), *cert. denied*, 113 S. Ct. 659 (1992). Thus, in the Seventh Circuit, federal law will rarely, if ever, preempt state trust law with respect to claims against a federally-regulated bankrupt, while in the Third Circuit federal law now will *always* preempt state law—and generally change the outcome—in those circumstances.

2. Moreover, the decision of the Third Circuit goes well beyond the narrow grounds under which this Court previously has permitted the creation of federal common law, especially where, as here, "*private parties* have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen* v. *Kemper Fin. Servs., Inc.*, 111 S. Ct. 1711, 1717 (1991) (emphasis added). The extremely limited role for federal common law embodied in this Court's landmark decision of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), rests on deeply rooted notions of democratic process and federalism.[14] In order to maintain this

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[13] As the dissent below recognized, *none* of the traditional indicia of a trust relationship—which focus on the parties' expression of intent to create a legal trust relationship—is present here. App. 70a (Nygaard, J., dissenting).

[14] *See, e.g., Milwaukee* v. *Illinois*, 451 U.S. 304, 312-13 (1981) ("[t]he enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress"); *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988) (Brennan, J., dissenting). *See also* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*,

proper structural balance, courts must "start with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the *clear and manifest purpose of Congress.*" *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 500 (1988) (emphasis added) (citations omitted).

Accordingly, even in those rare instances in which a uniform federal rule is warranted, this Court has repeatedly cautioned that the federal rule generally should be fashioned from traditional common law principles rather than created from whole cloth. See, *e.g.*, *Kimbell Foods*, 440 U.S. at 728; *Kamen*, 111 S.Ct. at 1717. As this Court declared only last Term, "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States* v. *Texas*, 113 S. Ct. 1631, 1634 (1993) (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)). "In order to abrogate a common law principle, the statute must '*speak directly*' to the question addressed by the common law." *Id.* (quoting *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978)).

The decision below, by contrast, sanctions federal common law preemption on nothing more than an unsupported inference that Congress (and the FERC), *had they considered the issue*, would have excused state-regulated gas distribution companies from the traditional principles of property and trust law that govern all other creditors' relationships with bankrupt gas pipelines. The simple fact is that neither Congress nor the FERC has done so,[15] however, and federal courts have no authority

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99 Harv. L. Rev. 883, 931-35 (1986) (discussing implications of federal common law on federalism).

[15] Indeed, until its brief to the Third Circuit, the FERC's expressed policy had always been that FERC-ordered refund obligations yield ordinary unsecured claims in bankruptcy. In *Transamerican Natural Gas Corp.*, 41 FERC ¶ 62,206, at p. 63,454 (1987),

to make such policy determinations. In any event, it is well established that Congress' purpose in enacting the NGA was limited to protecting gas consumers from *monopoly power*,[16] not protecting gas distribution companies from the ordinary risks of bankruptcy (or of fraud, economic downturns, natural disasters, etc.) faced by all commercial entities. Indeed, neither the language nor the legislative history of the NGA makes *any* reference whatsoever to bankruptcy. That statutory silence is telling because Congress clearly knew how to preempt state law to protect particular interest groups from the risks of bankruptcies by their trading partners. See *supra* note 9. The decision below is an unprecedented and dangerous expansion of the previously narrow scope of federal common law preemption.[17]

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for example, a bankrupt's request to the FERC for postponement of its refund obligations was denied because: "refusal to grant postponement . . . merely leaves the persons owed . . . refunds in the same position as [the debtor's] other creditors. Disposition of [the debtor's] assets in order to discharge its debts, including . . . refunds, is a matter for the court handling [the debtor's] bankruptcy proceeding."

[16] *See, e.g., Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 143 (1960); FERC Order No. 636-A, 57 Fed. Reg. 36,128, 36,136 (1992).

[17] Respondents attempt to obscure the broad implications of the standardless federal common law approach adopted below with a "public interest" smokescreen. Immediate payment of these customers' refund claims is necessary, they say, to insure that the customers' customers, residential gas consumers, have access to cheap gas to heat their homes and cook their food. However, it is gas distribution *corporations*, and *not* the gas-consuming public, that seek the disputed funds. And although receipt of refunds from the Debtor may well trigger refund obligations on the part of those distribution corporations to gas consumers, *nothing* prevents the respondent state public utility commissions from ordering those large corporations to accept the consequences of their decisions to do business with the Debtor and immediately refund to the gas-consuming public any amounts that those consumers were overcharged.

3. Because so many industries are now subject to some federal regulation, resolving the issue of what law governs rights in the property of federally-regulated bankrupts is of tremendous practical importance. First, by departing from established common-law trust principles in reliance upon which existing debtor-creditor relationships were premised, the Third Circuit has greatly upset established government and commercial expectations of pipeline creditors [18] and others.[19]

Second, the adverse impact of the decision below on the orderly bankruptcy system will be dramatic. The purpose of the statutory bankruptcy priority and distribution scheme was to replace costly and disruptive creditors' races to courthouses with an orderly process for the fair distribution of the bankrupt's assets. See *Begier* v. *IRS*, 496 U.S. 53, 58 (1990). By abandoning strict state law trust principles in favor of a result-driven policy approach to "trust" claims, the Third Circuit has invited exactly the type of standardless *ad hoc* adjudica-

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[18] All prior decisions by the FERC and the Third Circuit, including *Penn Central*, indicated that a pipeline's refund obligations could only be classified as unsecured debt. *See, e.g., supra* note 15; *In re Lehigh & New England Ry.*, 657 F.2d 570 (3d Cir. 1981). And, as the Sixth Circuit noted in *In re Ann Arbor R.R.*, 623 F.2d 480, 481 (6th Cir. 1980), *Penn Central* is a "landmark decision" that has been relied upon both by courts and by industry. Thus, a vast number of creditors, including the United States, will now find themselves collecting much less on their debts than anticipated because of the new preferred regulatory trust status created by the Third Circuit.

[19] Moreover, the Third Circuit's result-driven approach to federal common law preemption has inadvertently created the potential for an enormous volume of federal court litigation over the handling of refunds by pipelines. With the creation of a "trust" comes fiduciary obligations that are completely foreign to pipelines' handling of refunds. But now, every downstream consumer apparently has a "federal common law right"—enforceable in federal court—to challenge how upstream and downstream pipelines handle these monies.

tions that the statutory bankruptcy scheme was designed to avoid. Virtually any creditor of a federally-regulated bankrupt can make a credible argument that *some* generalized federal policy would be furthered by ensuring that it is paid in full, and there can be no doubt that all such creditors will press such "trust" claims in the future. *Cf. Elliott* v. *Bumb*, 356 F.2d 749, 755 (9th Cir.) (allowing state to avoid common law trust requirements "would open the door to state creation of priorities in favor of various classes of creditors by labeling such priorities as 'trusts.' This would tend to thwart or obstruct the scheme of federal bankruptcy"), *cert. denied*, 385 U.S. 829 (1966).

Third, and perhaps most important, the decision below leaves *all* creditors of federally-regulated entities helpless to anticipate the extent of the assets that will be available in the event of bankruptcy. An orderly bankruptcy process is important not only to creditors of insolvent entities, but also to the creditors of solvent entities *ex ante*, because terms of credit necessarily depend upon creditors' estimates of the risk of bankruptcy and their priority to assets ostensibly held by their debtors. And common law trust requirements provide the type of predictable legal framework necessary for vital credit markets. Under common law, a creditor could readily ascertain which assets held by the debtor were trust funds merely by observing, for example, whether any contractual relations exist which indicate a trust, whether the debtor paid interest, commingled the funds, or was restricted in any way from using the funds for its own purposes prior to distribution. See *supra* note 5. However, under the standardless "rule" announced by the Third Circuit, a creditor is placed in the impossible position of guessing how federal judges will evaluate numerous generalized federal policy interests unrelated to bankruptcy. This will have a drastic and negative effect on the credit market for interstate pipelines and other federally regulated entities.

Ironically, the decision below ultimately will hurt the very consumer interests it purports to advance. If pipelines are able to insulate certain creditors from risk, here their customers—many of whom are affiliates—they necessarily expose other creditors to more risk. These creditors, in turn, must in the future charge a higher interest rate to compensate themselves for the greater risk they bear due to the standardless loosening of the Bankruptcy Code's strict priority system. And the rates of many federally regulated entities, including those of the Debtor, are cost-based. Thus, these extra financing costs will be incorporated into the pipeline's rates and passed on to its customers (and eventually to ultimate consumers). "There is no panacea" in making a pipeline's customers better off by giving them preferred status to other creditors. *In re Iowa R.R.*, 840 F.2d at 542.[20]

At bottom, *no* substantial federal interest is furthered by abandoning established state law trust principles here. But there is much to fear from the Third Circuit's unprecedented and unwarranted expansion of federal common law preemption principles. Only review by this Court of the decision below can allay those legitimate fears.

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[20] Importantly, holding state-regulated gas distribution companies to the same state common-law rules as other commercial entities does *not* prevent them from reducing the risk of bankruptcy by establishing trust relationships. On the contrary, it merely requires them to establish those relationships—and thereby give notice to other creditors—*before* the pipeline bankruptcy (by, for example, merely expressing in their contracts with pipelines their intent to create trusts).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS *
JAMES F. BENDERNAGEL, JR.
DAVID L. LAWSON
SIDLEY & AUSTIN
1722 I Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Petitioner

November 3, 1993

* Counsel of Record

APPENDIX A

Filed July 6, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-7395, 92-7396, 92-7397, 92-7398, 92-7399
92-7400, 92-7410, 92-7411, 92-7412, 92-7413, 92-7414
92-7415, 92-7435, 92-7436, 92-7499, 92-7500

IN RE: COLUMBIA GAS SYSTEMS INC.,
COLUMBIA GAS TRANSMISSION CORPORATION

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION,
THOMAS E. ROSS,
Trustee

TENNESSEE GAS PIPELINE COMPANY,
Intervenor-defendant

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP ("the Partnership")
AND ITS SUBSIDIARY, OZARK FINANCE CORPORATION
(the "Company"),
Intervenors in support of Appellants

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of
Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of
Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC
SERVICE COMMISSION OF WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

COLUMBIA GAS SYSTEM, INC. ("CG") and
COLUMBIA GAS TRANSMISSION CORPORATION
("TCO" and together with CG, "the Debtors"),
Appellants No. 92-7395

(D.C. Civil No. 92-00127)

IN RE: COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS SYSTEMS INC.

v.

UNSECURED CREDITORS COMMITTEE
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of
Appellants
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 9/21/92 order)

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Intervenors in support of Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of Appellants
(per Court's 9/25/92 order)

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Intervenor in support of Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of Appellants
(per Court's 10/15/92 order)

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Intervenors in support of Appellants
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OFFICE OF CONSUMERS' COUNSEL, STATE OF OHIO (OCC),
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Amicus Curiae
(per Court's 10/23/92 order)

COLUMBIA GAS SYSTEMS, INC. ("CG") and COLUMBIA GAS TRANSMISSION CORPORATION ("TCO" and together with CG, "the Debtors"),
Appellants No. 92-7396

(D.C. Civil No. 92-00235)

IN RE: COLUMBIA GAS SYSTEMS INC.;
MERIDIAN OIL PRODUCTION INC.

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANS.
THOMAS E. ROSS,
Trustee

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
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OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

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Intervenors in support of Appellants
(per Court's 9/21/92 order)

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AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

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("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 9/21/92 order)

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Intervenors in support of Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
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WEST VIRGINIA,
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DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
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OFFICE OF THE CONSUMERS' COUNSEL, STATE OF OHIO (OCC),
Intervenor in support of Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

COLUMBIA GAS SYSTEM, INC. ("CG") and COLUMBIA GAS TRANSMISSION CORPORATION ("TCO" and together with CG, "the Debtors"),
Appellants No. 92-7397

(D.C. Civil No. 92-00239)

IN RE: COLUMBIA GAS SYSTEMS INC.;
PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Intervenor in support of Appellants
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF KENTUCKY,
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/21/92 order)

CONSUMER ADVOCATE DIVISION OF THE
PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA (OPC),
Intervenor in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL, STATE OF OHIO (OCC),
Intervenor in support of Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION, the MARYLAND PUBLIC SERVICE COMMISSION, The PUBLIC UTILITIES COMMISSION OF OHIO and the MARYLAND OFFICE OF PEOPLE'S COUNSEL,
Appellants No. 92-7398

(D.C. Civil No. 92-00241)

IN RE: COLUMBIA GAS SYSTEMS, INC.; MARYLAND OFFICE/PEOPLE'S COUNSEL

v.

COLUMBIA GAS SYSTEMS, INC.; COLUMBIA GAS TRANSMISSION CORPORATION

THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTIONS INC.,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
Intervenor in support of
Appellants
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE
COMMONWEALTH OF KENTUCKY,
Intervenor in support of
Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF
COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATURAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of
Official Committee of Customers
of the Columbia Gas
Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS TRANSMISSION COMPANIES,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

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("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of
Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

CONSUMER ADVOCATE DIVISION OF THE
PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
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(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenors in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
the MARYLAND PUBLIC SERVICE COMMISSION,
the PUBLIC UTILITIES COMMISSION OF OHIO and the
MARYLAND OFFCE OF PEOPLE'S COUNSEL,
Appellants No. 92-7399

(D.C. Civil No. 92-00242)

IN RE: COLUMBIA GAS SYSTEMS, INC.;
PUBLIC UTILITIES COMMISSION/OHIO

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANSMISSION CORPORATION
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC.,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
Intervenor in support of Appellants
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE
COMMONWEALTH OF KENTUCKY,
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF
COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of
Official Committee of Customers
of the Columbia Gas
Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
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TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of
Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

CONSUMER ADVOCATE DIVISION OF THE
PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA,
Intervenor, in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
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(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
the MARYLAND PUBLIC SERVICE COMMISSION,
the PUBLIC UTILITIES COMMISSION OF OHIO and the
MARYLAND OFFICE OF PEOPLE'S COUNSEL,
Appellants No. 92-7400

(D.C. Civil No. 92-00243)

IN RE: COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION
THOMAS E. ROSS,
Trustee

TENNESSEE GAS PIPELINE COMPANY,
Intervenor-defendant

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC
SERVICE COMMISSION OF WEST VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE NATURAL GAS COMPANY
("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenors in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

WEST OHIO GAS COMPANY,
THE PEOPLES NATURAL GAS COMPANY and
VIRGINIA NATURAL GAS, INC.,
Appellants No. 92-7410

(D.C. Civil No. 92-00127)

IN RE: COLUMBIA GAS SYSTEMS INC.;
WEST OHIO GAS CO.;
VIRGINIA NATURAL GAS, INC.;
PEOPLES NATURAL GAS COMPANY,
Appellants No. 92-7411

(D.C. Civil No. 92-00238)

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANSMISSION CORPORATION
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION ("TCo"),
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of
Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE
PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court 10/23/92 order)

IN RE: COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THOMAS E. ROSS,
Trustee

TENNESSEE GAS PIPELINE COMPANY,
Intervenor-defendant

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE
PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF THE COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Appellant No. 92-7412

(D.C. Civil No. 92-00127)

IN RE: COLUMBIA GAS SYSTEMS INC.;
OFFICIAL COMMITTEE/CUSTOMERS

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of
Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE ON UNSECURED CREDITORS OF
COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE
PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA,
Intervenors in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellant
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF THE COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Appellant No. 92-7413

(D.C. Civil No. 92-00236)

IN RE: COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THOMAS E. ROSS,
Trustee

TENNESSEE GAS PIPELINE COMPANY,
Intervenor-defendant

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNCIL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("Tco"),
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO;
Intervenors in support of
Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

COLUMBIA GAS OF KENTUCKY,
COLUMBIA GAS OF MARYLAND,
COLUMBIA GAS OF OHIO,
COLUMBIA GAS OF PENNSYLVANIA, AND
COMMONWEALTH GAS SERVICES, collectively
known as the COLUMBIA GAS DISTRIBUTION COMPANIES,
Appellants No. 92-7414

(D.C. Civil No. 92-00127)

IN RE: COLUMBIA GAS SYSTEMS INC.;
PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of
Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of
Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC
SERVICE COMMISSION OF WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Appellants No. 92-7415

(D.C. Civil No. 92-00241)

IN RE: COLUMBIA GAS SYSTEMS INC.;
MERIDAN OIL PRODUCTION INC.

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANS.,
THOMAS E. ROSS,
Trustee

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS ("Customer Committee") OF COLUMBIA GAS TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

OZARK GAS TRANSMISSION SYSTEM AND OZARK FINANCE CORPORATION,
Appellants No. 92-7435

(D.C. Civil No. 92-00239)

IN RE: COLUMBIA GAS SYSTEMS, INC.;
OZARK GAS TRANSMISSION SYSTEM;
OZARK FINANCE CORP.,
Appellants No. 92-7436

(D.C. Civil No. 92-00240)

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANS.;
THOMAS E. ROSS,
Trustee

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA (OPC),
Intervenor in support of Appellants
(per Court's 10/15/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS ("Customer Committee") OF COLUMBIA GAS TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

IN RE: COLUMBIA GAS SYSTEMS INC.;
MERIDIAN OIL PRODUCTION INC.

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANS.;
THOMAS E. ROSS,
Trustee

OZARK GAS TRANSMISSION SYSTEM AND OZARK FINANCE CORPORATION,
Appellants No. 92-7499

OZARK GAS TRANSMISSION SYSTEM; OZARK FIN. CORP.,
Appellants No. 92-7499

(D.C. Civil No. 92-00239)

IN RE: COLUMBIA GAS SYSTEM, INC.;
OZARK GAS TRANSMISSION SYSTEM;
OZARK FINANCE CORP.,
Appellants No. 92-7500

(D.C. Civil No. 92-00240)

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANS.;
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION, INC.
Intervenor-Appellee
(per Court order dated
11/6/92)

On Appeal from the United States District Court
for the District of Delaware

(D.C. Civil Nos. 92-00127, 92-00235, 92-00236,
92-00238, 92-00239, 92-00240, 92-00241, 92-00242,
92-00243)

Argued: April 1, 1993

BEFORE: SLOVITER, *Chief Judge*, COWEN and
NYGAARD, *Circuit Judges*
(Filed July 6, 1993)

OPINION OF THE COURT

COWEN, *Circuit Judge.*

Columbia Gas Transmission Corporation ("Columbia"), an owner of a natural gas pipeline, filed a bankruptcy petition and moved for court permission to pay certain pre-petition obligations, including: (1) refunds collected from upstream suppliers and owed to Columbia's customers; (2) research surcharges collected from customers and owed to a nonprofit industry research institute; and (3) bills for purchases of natural gas from upstream suppliers. The district court held that all of these funds are property of the bankruptcy estate, and therefore may not be distributed to select creditors. Columbia asserts that since it holds these funds in trust, the money it seeks to distribute to satisfy these obligations is not property of its bankruptcy estate.

Federal common law, rather than state law, governs the inquiry whether Columbia holds these monies in trust. Applying federal common law, we conclude that Columbia holds the customer refunds and research surcharges in trust, but the obligations to upstream suppliers are ordinary unsecured debt. Accordingly, we will reverse in part and affirm in part the order of the district court, and remand for further proceedings consistent with this opinion.

I. *FACTUAL AND PROCEDURAL BACKGROUND*

Columbia purchases natural gas from upstream pipeline suppliers, transports this gas in interstate commerce, and resells it to local distribution companies. The local distribution companies, about half of which are affiliates of Columbia, then sell this natural gas to the ultimate users, the gas-consuming public. Columbia transports natural gas through 18,900 miles of pipeline to thirteen

Northeastern, Middle Atlantic, Midwestern and Southern states, as well as to the District of Columbia. Together with its affiliates, Columbia operates one of the largest natural gas systems in the country. As such, its operations are extensively regulated by the Federal Energy Regulatory Commission ("FERC" or "Commission") pursuant to the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717w (1988 & Supp. III 1991). Among other things, FERC ensures that the rates gas companies charge are just and reasonable. *See id.* § 717c(a).

On July 31, 1991, Columbia and its parent corporation, The Columbia Gas System, Inc., filed petitions for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101-1174 (1988 & Supp. III 1991), in the United States Bankruptcy Court for the District of Delaware. Columbia continued to operate as a debtor in possession. *See* 11 U.S.C. §§ 1107, 1108. On August 23, 1991, Columbia filed a motion (the "FERC motion") requesting authority to pay certain pre-petition obligations in order to comply with its FERC tariff orders. Specifically, Columbia sought: (1) to refund to its customers amounts refunded to it by upstream pipelines that previously had overcharged it for gas and transportation services; (2) to pay surcharges collected from customers and owed to the Gas Research Institute ("GRI"); and (3) to pay bills for pre-petition purchases of natural gas supplies and transportation services from upstream pipelines.

A. *Overview of the Federal Regulatory Scheme*

Interstate natural gas pipelines are subject to extensive federal regulation under the Natural Gas Act, and FERC regulations and orders. Natural gas companies initially set their own rates and other terms for the transportation or sale of gas, typically by contract with their customers. *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 341, 76 S. Ct. 373, 379 (1956). All rates,

however, must be "just and reasonable" or they are unlawful. 15 U.S.C. § 717c(a).[1]

FERC, not the courts, initially decides whether rates are reasonable. *See Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251, 71 S. Ct. 692, 695 (1951). Therefore, natural gas companies must file with FERC all proposed rates and contracts for the sale or transportation of gas, *see* 15 U.S.C. § 717c(c), and may not change a filed rate or contract without providing FERC with thirty days notice, *see id.* § 717c(d). The Commission may modify or reject any proposed rate or contractual term that fails to comply with the Natural Gas Act. *See id.* § 717d(a).

When a pipeline files a proposed rate change, FERC must issue an order within thirty days approving or invalidating the new rate. The Commission also has authority to preserve the status quo pending its review of a newly filed rate by suspending the effectiveness of the proposed rate for up to five months. *See id.* § 717c(e). If FERC suspends a rate that takes effect after five months, the new rate becomes effective subject to refund if FERC later declares the rate unreasonable. *See id.* § 717c(e). Refunds are retroactive to the date the new rate took effect and include interest from the date of collection at a rate based on the prime rate. *See* 18 C.F.R. § 154.67 (c)(2)(iii) (1992).

FERC's power is not limited to reviewing changes in rate and contractual terms; it also may review existing rates and practices of natural gas companies. If the Commission finds that any rate, contract or practice of a

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[1] Section 717c(a) provides:

> All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

gas company is unjust, unreasonable, unduly discriminatory or preferential, it may determine the reasonable rate, contract term or practice and order the offending company to comply with its determination. *See* 15 U.S.C. § 717d(a). The Commission may not, however, impose a rate retroactively if it finds that a previously approved rate is unjust or unreasonable. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578, 101 S. Ct. 2925, 2930 (1981); *see also* 15 U.S.C. § 717d(a). Instead, FERC may adjust for past unreasonably high or low charges when it sets future rates.

The provisions of the NGA outlined above give rise to the "filed rate doctrine." Under that doctrine, a reasonable rate is that which FERC fixes, subject only to deferential judicial review. *See Mississippi Power & Light Co. v. Moore*, 487 U.S. 354, 371, 108 S. Ct. 2428, 2439 (1988). Once the reasonable rate is determined, gas companies may not collect any other rate. *See Arkansas Louisiana Gas Co.*, 453 U.S. at 578, 101 S. Ct. at 931.

B. *Background of Columbia's Claims*

Because of the shortage of natural gas in the late 1970s and early 1980s, many pipeline owners, including Columbia, entered into long-term contracts with natural gas producers containing take-or-pay clauses. A take-or-pay clause obligates a pipeline to purchase a certain amount of gas at a specified price. The pipeline agrees to pay for a set quantity of gas even if it actually takes less. By 1987, an oversupply of natural gas significantly decreased market prices, and pipeline customers had little incentive to purchase gas from pipelines at prices sufficient to allow the pipelines to cover the cost of gas they agreed to pay in their take-or-pay contracts. As a result, pipelines' gas sales declined, and the pipelines faced billions of dollars in accrued and future take-or-pay liability.

In response to this crisis, FERC allowed pipelines to buydown or buyout their contracts with producers. In a

buydown, a pipeline pays to reform the contract. In a buyout, a pipeline pays a supplier to terminate the contract. To alleviate the pipelines' financial hardship, FERC issued Order 500, an interim rule, which required producers, pipelines and pipeline customers to equitably share the costs associated with buydowns and buyouts. *See Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol,* 52 Fed. Reg. 30,334 (1987) ("Order 500"). In short, Order 500 provided that if a pipeline agreed to absorb twenty-five to fifty percent of its settlement costs to buydown or buyout its high-cost contracts, the pipeline could pass through an equal portion to its customers through fixed charges. Order 500 permitted pipelines to utilize the purchase deficiency method to allocate these fixed charges among its customers. The purchase deficiency method assigned a customer a share of the buyout or buydown costs in proportion to the decline in that customer's gas purchase. Pursuant to Order No. 500, Columbia filed a tariff with FERC to recover its buyout costs from its customers.

The Court of Appeals for the District of Columbia Circuit struck down the purchase deficiency allocation method because it violated the filed rate doctrine of the NGA by imposing a retroactive rate increase for gas sold in the past. *See Associated Gas Distribs. v. FERC,* 893 F.2d 349, 355 (D.C. Cir. 1989), *cert. denied,* 498 U.S. 907, 111 S. Ct. 277 (1990). After this decision, FERC issued Order No. 528, which required pipelines to file new tariffs that allocated the fixed charges pursuant to a different formula. *See Mechanisms for Passthrough of Pipeline Take-or-Pay Buyout and Buydown Costs—Order No. 528,* 53 FERC (CCH) ¶ 61,163, at 61,594-95 (1990) ("Order 528"). Order 528 also required the suppliers to refund the amounts customers had been overcharged under the purchase deficiency formula. *Id.* at 61,595-96.

Pursuant to Order 528, five upstream pipelines that supplied gas to Columbia filed new rate schedules which allocated $134 million less in buyout or buydown costs to

Columbia than under the purchase deficiency method. Columbia, in turn, filed tariff provisions with FERC to flow through these refunds to its downstream customers. These refunds, together with approximately $26 million in refunds arising from other overcharges for gas transportation services, comprise the customer refunds that Columbia seeks to exclude from its bankruptcy estate and pay to its customers. At the time it filed for bankruptcy, Columbia already had received only $21 million in refunds from the upstream pipelines and expected to receive $140 million in the future.

Columbia maintained its financial records in accordance with the Uniform System of Accounts promulgated by FERC. *See* 18 C.F.R. Pt. 201 (1992). When Columbia received a refund, it recorded an increase to its assets and a corresponding liability to the appropriate customers. It did not pay income tax on refunds unless it failed to forward the money to its customers within eight and a half months. Columbia tracked the various refunds through separate paper accounts. These accounts are not actual money accounts, but informational mechanisms for accomplishing the complicated task of tracking its refund obligations. Accounts were created based on the source of the refund, the legal reason for the refund, the time period to which the refund relates, and the designated downstream recipient. This process required Columbia to maintain approximately one hundred separate refund accounts.

Columbia received refunds from upstream suppliers in the form of checks, wire transfers and billing credits, and passed refunds through to its customers through all of these devices. Columbia paid interest to its customers at a statutorily prescribed rate for the time it retained the customer refunds. *See* 15 U.S.C. § 717c(e); 18 C.F.R. § 154.67(c)(2).

Although it meticulously tracked refunds on paper, Columbia did not maintain separate bank accounts for the

different refunds. It employed a combined cash management system and utilized all of its cash without restriction. At the end of every day, excess cash was either invested or used to repay short-term debt to its parent. Therefore, when it filed its bankruptcy petition, Columbia had only $3.3 million in cash. This pooling of funds promoted efficient utilization of cash resources.

The second category of payments Columbia sought to make was $1.8 million in surcharges owed to GRI. GRI is a non-profit organization which manages research and development projects related to natural gas production and transportation. It does not provide any services directly to Columbia. GRI is financed predominantly through FERC-approved surcharges on gas delivered through regulated pipelines. Pursuant to this regulatory mechanism, each pipeline, including Columbia, collects a separately identified charge from its customers and then remits this money to GRI within fifteen days. *See Gas Research Institute—Opinion No. 226,* 28 FERC (CCH) ¶ 61.386, at 61.705 (1984). The Commission's accounting rules require that monies collected on behalf of GRI be tracked in a separate account. *See* 18 C.F.R. Pt. 201, § 188.

In its FERC motion, Columbia also sought to pay upstream suppliers $15.3 million for gas delivered and transportation services provided to it in the two months prior to its filing for bankruptcy.

C. *Decisions of the Bankruptcy and District Courts*

Columbia argued to the bankruptcy court that the funds earmarked for customer refunds, GRI charges and upstream suppliers' bills are not property of its bankruptcy estate because these funds are held in trust for its customers, GRI and upstream suppliers respectively. The Customers Committee and several local distribution companies supported Columbia's position, while the Unsecured

Creditors Committee and other individual unsecured creditors opposed it.

A bankruptcy estate includes all property of the debtor, but only to the extent of the debtor's equitable interest in such property. *See* 11 U.S.C. § 541(d) (1988). Therefore, if Columbia possessed only legal title to the monies at issue, these funds would not be an asset of the bankruptcy estate, and could be distributed.

The bankruptcy court first held that federal common law controlled whether Columbia had an equitable interest in the funds. Applying federal common law, the bankruptcy court found that the refunds Columbia received under FERC orders, as well as the GRI surcharges, are held in trust for its customers and GRI. Thus, Columbia has no equitable interest in these payments. The bankruptcy court attached minimal significance to Columbia's commingling of the trust funds with general revenues because of the economic inefficiency of establishing numerous separate cash accounts.

Because the commingling precluded specifically tracing the trust funds, however, the bankruptcy court endorsed the lowest intermediate balance test. This principle assumes that money held in trust is withdrawn last from a commingled account. Once trust money is withdrawn, however, it is not replenished by subsequent deposits. Therefore, a beneficiary is entitled only to the lowest intermediate cash balance in a commingled account. To satisfy the obligations arising from customer refunds and GRI charges that Columbia received pre-petition, the bankruptcy court held that Columbia could distribute only the $3.3 million in cash it had when it filed for bankruptcy. The remaining pre-petition obligations would be unsecured debt. The bankruptcy court also found that Columbia could flow through to its customers and GRI all refunds and surcharges received post-petition.

The bankruptcy court denied Columbia's request to pay upstream pipelines. The bankruptcy court distinguished these payments from the customers refunds and GRI charges in two respects: (1) the upstream payments were for goods and services; and (2) Columbia sought to distribute funds that it had not already collected from customers, but that it would recover in the future. The bankruptcy court also held that payments to the upstream pipelines were not necessary for a successful reorganization under 11 U.S.C. § 105(a) (1988).[2]

The district court reversed the disposition of the customer refunds and GRI payments, but affirmed the bankruptcy court's decision with respect to the upstream pipeline payments. As a threshold matter, the district court held that state law controlled the treatment of the refunds and other monies. The district court examined the contracts between Columbia and its customers to discover whether the parties manifested the requisite intent to create an express trust and found that they had not. The district court also found Columbia's commingling of the funds and the statutory requirement that interest be paid to be indicia of a debtor-creditor, rather than a trustee-beneficiary relationship. The district court stated that even if federal common law controlled, the result would be the same.

The district court also rejected the theory that because Columbia was a mere conduit for the funds to reach the customers, it held the money in constructive trust for its customers. The court found the state law requirement of wrongful conduct absent in this case. It also found no identifiable trust property due to the commingling of funds. The district court agreed with the reasoning and

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[2] The bankruptcy court also found that the customer refunds and GRI surcharges precluded from immediate distribution by operation of the lowest intermediate balance test were not necessary to rehabilitate Columbia. No party appeals this decision.

conclusions of the bankruptcy court concerning the obligations owed to upstream suppliers.

Fourteen parties appealed the ruling of the district court. Additionally, FERC submitted an *amicus curiae* brief expressing its view that the customer refunds and the GRI surcharges are held in trust.

II. *CUSTOMER REFUNDS*

The principal issue on appeal is whether the customer refunds Columbia receives from upstream suppliers and passes on to its customers are property of Columbia's bankruptcy estate as defined in 11 U.S.C. § 541(d). This inquiry turns on whether Columbia holds the refunds in trust for its customers. *See infra* part II.B. Before addressing the merits of this issue, however, we must determine whether this question should be resolved under federal common law or state law. We exercise plenary review over this legal question. *See United States v. Med O Farm, Inc.*, 701 F.2d 88, 89 (9th Cir. 1983); *cf. Armotek Indus., Inc. v. Employers Ins. of Wasau*, 952 F.2d 756, 760 n.5 (3d Cir. 1991) (which state's law controls is a legal question subject to plenary review).

A.

It is axiomatic that federal law governs questions involving the interpretation of a federal statute. *See Kamen v. Kemper Fin. Services*, —— U.S. ——, 111 S.Ct. 1711, 1717 (1991). Therefore, it is clear, and the parties do not dispute, that federal law defines the parameters of section 541(d) of the Bankruptcy Code. This, however, is only the beginning of the inquiry. The deterination that federal law applies does not inevitably require the application of a uniform federal rule. Applying federal law, courts may either fashion a uniform federal common law rule or adopt state law as the federal rule of decision.

See id.; United States v. Kimbell Foods, Inc., 440 U.S. 715, 727-28, 99 S. Ct. 1448, 1458 (1979).

In *Kimbell Foods,* the Supreme Court outlined the analysis that determines whether uniform federal common law or state law should apply. The determination depends on the nature and importance of the government interest at issue and the effect of applying state law. *Kimbell Foods,* 440 U.S. at 727-28, 99 S. Ct. at 1458. To decide whether a national federal rule is necessary, courts should consider: (1) the need for a nationally uniform law; (2) whether incorporation of state law would frustrate specific objectives of the federal program at issue; and (3) the extent to which application of a federal common law rule would upset commercial expectations that state law would govern. *See id* at 728-29, 99 S. Ct. at 1458-59; *Adams v. Madison Realty & Dev. Inc.*, 937 F.2d 845, 856 (3d Cir. 1991). Developing a federal common law rule is the exception rather than the rule. Federal law should coincide with the relevant state law unless state law would undermine the objectives of the federal statutory scheme and there is a distinct need for nationwide legal standards. *See Kimbell Foods,* 440 U.S. at 728, 99 S. Ct. at 1458.

Whether the customer refunds are held in trust for Columbia's customers, and therefore excluded from the bankruptcy estate, sufficiently implicates important federal interests to warrant the application of federal common law. First, a national uniform law is necessary. The refunds at issue are created by an order of FERC. Their purpose is to compensate customers who have been charged excessive rates for natural gas. Private parties may not alter the refund orders by contract or otherwise. Indeed, the very purpose of the NGA is to supersede private contractual arrangements that interfere with the federal objective of ensuring that pipelines charge only reasonable rates. Because the refunds arise directly from federal law and implement the central objective of the NGA, the property

rights Columbia has in these customer refunds should not be subject to the vagaries of state trust law. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310, 108 S. Ct. 1145, 1156 (1988) (("[U]niformity of regulation . . . was an objective of the Natural Gas Act.") (quoting *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84, 91-92, 83 S. Ct. 646, 651 (1963)).

Second, applying state law to determine Columbia's property rights in the refunds would frustrate the NGA's central purpose, to provide natural gas to the public at reasonable rates. *See generally FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 612, 64 S. Ct. 281, 292 (1944) NGA is "plainly designed to protect the consumer interests against exploitation at the hands of private natural gas companies"). Trust law in numerous states imposes a constructive trust on funds only if wrongdoing has resulted in unjust enrichment. *See, e.g., Suttles v. Vogel*, 533 N.E. 2d 901, 905 (Ill. 1988); *Roper v. Edwards*, 373 S.E.2d 423, 424-25 (N.C. 1988); *Adams v. Jankouskas*, 452 A.2d 148, 152 (Del. 1982). Absent an express trust or affirmative wrongdoing, state law would not hold the refunds in trust on behalf of Columbia's customers. Federal common law, however, provides a more expansive definition of an implied trust. Federal common law imposes a trust when an entity acts as a conduit, collecting money from one source and forwarding it to its intended recipient. *See In re Penn Central Transp. Co.*, 486 F.2d 519, 523-27 (3d Cir. 1973) (in banc), *cert. denied*, 415 U.S. 990, 94 S. Ct. 1588 (1974).

The Court of Appeals for the District of Columbia Circuit held that the pipelines overcharged the gas-consuming public. *See Associated Gas Distrib.*, 893 F.2d at 355. To remedy this violation of the NGA, FERC ordered refunds to be paid by upstream suppliers to Columbia and further ordered Columbia to flow through these refunds to its customers and eventually to the public. If FERC intended

that Columbia act as a conduit for the refunds to reach the public, but state law would not create a trust, FERC's objective of ensuring the exploited customers to receive the full amount of their refunds would be subverted by state law. Application of the federal common law rule is necessary to prevent such an outcome. Because the disposition of the refunds has the potential to enforce or undermine the dictates of a federal regulatory scheme, it is an issue "distinctively federal in character," warranting application of federal common law. *See United States v. Standard Oil Co.*, 332 U.S. 301, 305, 67 S. Ct. 1604, 1607 (1947) (federal common law controls creation of liability for interference with government-soldier relationship); *see also D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 455-56, 62 S. Ct. 676, 678-79 (1942) (federal common law governs enforceability of promissory notes held by the Resolution Trust Corporation).

Application of state law not only would frustrate the purpose of the NGA, but also would warp the definition Congress intended to provide to the exclusion from the bankruptcy estate for equitable interests. *See* 11 U.S.C. § 541(d). The legislative history of section 541(d) makes clear that when a debtor collects money on behalf of another, this money is held in constructive trust for the intended eventual recipient even absent any misconduct. *See* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 368 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6324.[3] Since in some cases state law is inconsistent with this definition, it must be displaced.

Finally, applying federal common law will not upset commercial expectations that state law would govern. Creditors cannot reasonably assume that state law will allocate various parties' interests in federally created property rights. Moreover, this court already has developed federal common law concerning trusts. *See Penn Central*,

[3] *See infra* typescript at 60.

486 F.2d at 523-25. Therefore, our decision to apply federal common law will not require us to announce new doctrines of substantive law unforeseen by the parties.

In *In re Lehigh & New England Railway Co.*, 567 F.2d 570 (3d Cir. 1981), this court applied federal common law to a factually similar case. There, shippers paid a single railway, which transported a shipment over tracks owned by numerous railroads. The compensated railroad maintained interline accounts to track the amounts it owed to other railways for use of their tracks, and settled these accounts at the end of each month. When a railway went into receivership, the railroads that were owed interline payments sought to be paid from the debtor's mortgaged assets prior to both the secured and unsecured creditors, claiming that the money owed was held in trust for their benefit.

This court held that federal common law governed the disposition of the interline revenues. *See Lehigh*, 657 F.2d at 575-76. Several circumstances informed our decision. First, the interline funds arose from railroad operations, which are under the exclusive control of Congress. *Id.* at 575. Second, Congress, had enacted comprehensive legislation, the Interstate Commerce Act, evidencing its intent to ensure the coordination of interline rail transportation. *Id.* Third, Congress regulated the rates charged by railroads through a federal agency, the Interstate Commerce Commission. *Id.* Finally, we observed that uniformity in the method of balancing interline accounts was necessary to allow our nation's railways to operate as an integrated network. *Id.* Based on these four factors, this court concluded that the distribution of interline payments "implicate[s] wholly national concerns and therefore should be governed by federal law." *Id.* at 576.

The same rationale applies here. The customer refunds arose from the sale of natural gas, which is regulated by Congress. Congress has enacted comprehensive legislation,

the NGA, to regulate the gas industry, and it created a federal agency, FERC, to interpret and enforce this regulatory scheme. There is an even greater federal interest in this case than in *Lehigh*. The intricate system of accounts pipelines maintain to track refunds, the backbone of the federal scheme to regulate the gas industry, is mandated by federal law. *See* 18 C.F.R. Pt. 201, § 496 (1992). In contrast, the railroads in *Lehigh* voluntarily adopted the interline balance system.

The district court distinguished *Lehigh* because it found that regulation of the railroad industry was significantly more pervasive than regulation of the gas industry. The district court based this conclusion primarily on the fact that gas suppliers negotiate individualized rates with distributors while the Interstate Commerce Commission, at the time *Lehigh* was decided, set nationwide railroad rates and effectively precluded private contracts from establishing rates. *See United Gas Pipe Line Co., v. Mobile Gas. Serv. Corp.*, 350 U.S. 332, 338-39, 76 S. Ct. 373, 378 (1956); *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 109-10, 79 S. Ct. 194, 198 (1958).[4] The district court, however, ignored the rationale underlying these different procedures.

The NGA and the Interstate Commerce Act contain almost identical language about the legally permissible rates gas pipelines and railways respectively may charge.

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[4] The district court highlighted the special importance of railroads in our economy by noting the swift action taken by Congress and the President to avert a national railroad strike that threatened to paralyze the economy. *See* Settlement of the Railroad Labor-Management Disputes. Pub. L. No. 102-306, 106 Stat. 260 (1992). We have no reason to believe that Congress and the President would not be similarly concerned if a natural gas strike threatened to halt the supply of natural gas to residents and businesses throughout the nation. Therefore, we do not find this evidence probative of the relative extent of the federal interest in the two industries.

Compare 15 U.S.C. § 717c(a) (gas company rates "shall be just and reasonable") *with* 49 U.S.C.A. § 1004(a) (1963) (repealed 1978) (railroads may charge only "just and reasonable rates").[5] Although Congress utilized varying methods in the two industries to ensure that consumers are not overcharged, Congress did not thereby intend to regulate either the railroad or gas industry more stringently. The Supreme Court explained that Congress abrogated contractually negotiated rates in the railroad industry for reasons of administrative convenience:

> The vast number of retail transactions of railroads made policing of individual transactions administratively impossible; effective regulation could be accomplished only by requiring compliance with a single schedule of rates applicable to all shippers. On the other hand, only a relatively few wholesale transactions are regulated by the Natural Gas Act . . . . [Therefore,] the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts . . . .

Mobile Gas, 350 U.S. at 338-39, 76 S. Ct. at 378. Moreover, FERC's ability to regulate gas rates is not in any way limited by the existence of private contracts since all contracts are "subject of course to any overriding authority of the Commission." *Memphis Light,* 358 U.S. at 114, 79 S. Ct. at 200. We therefore find no persuasive basis to distinguish *Lehigh* from this case.

Our decision to apply the federal common law of trusts is consistent with *Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement,* 962 F.2d 1192 (6th Cir.), *cert. denied,* —— U.S. ——, 113 S. Ct. 659

[5] Although the Customers Committee notes that regulation of railroads has changed significantly since *Lehigh,* the regulation in effect at the time this court decided *Lehigh* is relevant.

(1992), upon which the Committee of Unsecured Creditors heavily relies. In that case, a gas pipeline appropriated an exclusive underground natural gas storage easement beneath private property pursuant to its eminent domain authority under the NGA. The NGA required the pipeline to compensate the landowners. The *Exclusive Natural Gas court* declined to create federal common law to calculate the value of the land. 962 F.2d at 1195-99. Instead, it held that the standard of valuation should incorporate the law of the state in which the condemned property is located. *Id.*

Exclusive Natural Gas does not stand for the broad proposition, as the Committee of the Unsecured Creditors contends, that reference to state law doctrines to interpret sections of the NGA will not frustrate the goals of that statute. Rather, *Exclusive Natural Gas* addressed a specific section of the NGA, 15 U.S.C. § 717f(h). Section 717 (h), which governs the right of eminent domain, expressly provides that "[t]he practice and procedure in any [eminent domain] action or proceeding . . . shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated." Because the statutory language explicitly instructed federal courts to look to state "practice and procedure," the court read the section "as raising a strong presumption" that state substantive law is also applicable. *Exclusive Natural Gas,* 962 F.2d at 1197. In contrast, neither the NGA nor the FERC order which creates the customer refunds mention application of state law. Therefore, no "strong presumption" in favor of state law exists in this case.

Additionally, the *Exclusive Natural Gas* court found that using state law valuation rules would not undercut the objectives of the NGA because the effect of the state law rule would be minimal. All parties agreed that the condemners had to pay for the easement they appropriated;

the only disputed issue was how to calculate the value of this easement. The court found that any variance between a conceivable federal common law rule and the state law rule was too small and too speculative to rise to the level of frustrating the NGA. *Id.* at 1198. In this case, the parties disagree on who equitably owns the customer refunds. Columbia or its customers as the beneficiaries of a trust. This dispute does not implicate an ancillary issue of valuation, but determines whether or not many millions of dollars become part of Columbia's bankruptcy estate. For all of these reasons, *Exclusive Natural Gas* is easily distinguishable from the present case.

B.

Having determined that federal common law governs whether the customer refunds are property of Columbia's bankruptcy estate, we turn to the merits of that issue.[6] Applying federal common law, the bankruptcy court found that Columbia held these refunds in trust for its customers, and therefore excluded them from the bankruptcy estate. This holding was a legal conclusion, but was predicated on many factual findings. We exercise the same review over the bankruptcy court's order as the district court. *See Brown v. Pennsylvania State Employees Credit Union*, 851 F.2d 81, 84 (3d Cir. 1988). We accept the bankruptcy court's factual findings unless they are clearly erroneous, but conduct a plenary review of the ultimate legal con-

[6] The Committee of Unsecured Creditors devotes a significant portion of its brief to arguing that (1) the NGA does not modify the priority scheme of the Bankruptcy Code, which is based on equality of distribution for all creditors; and (2) no universal priority in favor of statutory schemes exists. *See* Committee of Unsecured Creditors Brief at 20-25. By so framing the issue, the Creditors Committee overlooks the dispositive question. The issue before us is whether the refunds are property of the bankruptcy estate. If the refunds are excluded from the bankruptcy estate, the priority scheme is not implicated because it only controls how to divide assets contained in the bankruptcy estate.

clusion. *See Meridian Bank v. Alten*, 958 F.2d 1226, 1229 (3d Cir. 1992).

The Bankruptcy Code provides that "all legal or equitable interests of the debtor" become property of the bankruptcy estate. *See* 11 U.S.C. § 541(a)(1). Courts have construed this definition broadly to include interests in causes of action, *see, e.g., Esselen Assoc. v. Cryen/Montenay Energy Co.*, 102 B.R. 25, 28 (S.D.N.Y. 1989), *aff'd in relevant part and rev'd in part*, 902 F.2d 1098 (2d Cir. 1990); *Amazing Enters. v. Jobin (In re M & L Business Mach. Co.)*, 136 B.R. 271, 275 (Bankr. D. Colo. 1992), and common carrier certificates, *see, e.g., Bernstein v. R.C. Williams, Inc. (In re Rocky Mountain Trucking Co.)*, 47 B.R. 1020, 1021 (D. Colo. 1985); *In re Brown Transp. Truckload, Inc.*, 118 B.R. 889, 893 (Bankr. N.D. Ga. 1990). The Bankruptcy Code, however, exempts specific interests from a debtor's estate. For example, section 541(d) provides:

> Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate . . . only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. § 541(d).

All parties agree that trustee has no equitable interest in funds it holds in trust. Indeed, that is the classic definition of a trust—the beneficiary has an equitable interest in the trust property while legal title is vested in the trustee. *See* Restatement (Second) of Trusts § 2 cmt. f (1959); 1 A. W. Scott & W.F. Fratcher, *The Laws of Trusts* § 12.2 (4th ed. 1989). Therefore, if Columbia holds the customer refunds in trust, as it asserts, these refunds are excluded from Columbia's bankruptcy estate and are immediately payable to its customers.

Congress clearly intended the exclusion created by section 541(d) to include not only funds held in express trust, but also funds held in constructive trust [7]:

> Situations occasionally arise where property ostensibly belonging to the debtor will actually not be property of the debtor, but will be held in trust for another. For example, if the debtor has incurred medical bills that were covered by insurance and the insurance company had sent the payment of the bills to the debtor before the debtor had paid the bill for which the payment was reimbursement, *the payment would actually be held in constructive trust for the person to whom the bill was owed.*

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 368 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6324 (emphasis added). This insurance example evidences that Congress intended that when a debtor is a mere conduit for funds to travel from one party to another, it lacks an equitable interest in the monies. *See T & B Scottdale Contractors, Inc. v. United States,* 866 F.2d 1372, 1376 (11th Cir.) ("[t]he legislative history of 11 U.S.C.A. § 541 makes it clear that funds in debtor's possession held for a third-party do not become part of the estate in bankruptcy"), *cert. denied*, 493 U.S. 486, 110 S. Ct. 139 (1989).

Applying federal common law, this court previously has imposed an implied trust on funds held by a bankrupt debtor for another entity. *See In re Penn Central Transp. Co.*, 486 F.2d 519, 523-27 (3d Cir. 1973) (in banc), *cert. denied*, 415 U.S. 990, 94 S. Ct. 1588 (1974).[8] In *Penn Central*, railroads that shipped goods traveled over

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[7] We do not reach the question whether section 541(d) excludes any interest other than funds held in trust.

[8] *Penn Central* is a pre-Bankruptcy Code decision, but its analysis of whether the interline balances were held in trust is identical to the inquiry the Code requires.

railroad tracks owned by many different railways. To facilitate operations, the shipping railroad collected the entire charge from the customer, a portion of which it owed to the other railways whose tracks had been utilized. The railroad industry voluntarily created a complex system of accounting for these interline revenues and settled the balances in each interline account monthly.

Penn Central held that a trust relationship exists when the parties manifest an intention to create a trust. *Id.* at 524. The parties, however, need not employ any talismanic language—"failure to expressly designate the relationship as one of trust does not necessarily negate its existence." *Id.*[9] Absent a document definitively establishing a trust relationship, we look to the language of the parties, their conduct, and other circumstances surrounding the transaction probative of their intent. *See id.* at 524-27.

The *Penn Central* court found that "the collecting railroad serves merely as a receiving and transmitting agent" as to the money it receives for the use of other railways' tracks. *Id.* at 523-24. Therefore, we held, the "freight charges, *when collected*, are held in trust." *Id.* at 524 (emphasis in original). We found significant that the interline balances did not represent payments by one railroad to another for services rendered. *See id.* at 528. The railroads owed one another money simply because they had collected fees on another's behalf.

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[9] The Committee of Unsecured Creditors emphasizes that Congress knows how to create a trust relationship. *See, e.g.*, 7 U.S.C. § 499e(c)(2) (1988) ("[p]erishable agricultural commodities received by a . . . broker . . . shall be held by such . . . broker in trust for the benefit of all unpaid suppliers"); 26 U.S.C. § 7501(a) (1988) (federal taxes withheld by employers are "held to be a special fund in trust for the United States"). Although our task would be much easier if the NGA explicitly stated that refunds are held in trust for overcharged customers the absence of such express language is the beginning, not the end, of our inquiry. *See Penn Central*, 486 F.2d at 524.

Another indicia of a trust emphasized in *Penn Central* was the absence of any provision for the payment of interest. *Id.* at 524. One party permitting another to use its money for a period of time in exchange for the payment of interest is the hallmark of a debtor-creditor relationship. Therefore, the absence of interest payments of interline balances counseled in favor of finding a trust.

Usually, the commingling of trust funds with general revenues also indicates a debtor-creditor relationship. The *Penn Central* court found, however, that the "[c]ommingling of monies has minimal significance in the extraordinary operations of interline railroads." *Id.* at 525. Because it would be highly inefficient to segregate the numerous collections railroads received, little weight was accorded to this factor.

The *Penn Central* court found the trust principles it applied "appropriate to any industry," *see id.* at 527 we now apply them to the facts of this case. Before examining the extent of Columbia's interest in the refunds, we must discuss how this interest is created. Typically, trust and debtor-creditor relationships are created by contractual agreement between two parties. Here, however, the refunds and the mechanism to distribute them were created by FERC, pursuant to its statutory authority under the NGA. Neither Columbia nor its customers could alter their respective interests in the refunds by contract. Because FERC unilaterally created the refunds, our characterization of the debtor's interest in these refunds turns on the manifestations of FERC's intent.[10]

FERC ordered Columbia to collect refunds from upstream suppliers and flow through these monies to its cus-

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[10] The district court erroneously concentrated on the contracts between Columbia and its customers. The district court stated: "The contracts explicitly detail the terms of billing and payments, yet significantly include no indication of a trust relationship. . . . [T]he refunds are based directly on these contracts." App. at 104.

tomers, local distribution companies, who in turn must flow through the funds to the gas-consuming public. *See Order 528, supra*, at 61,596 ("all refunds must be paid by upstream and downstream pipelines to the customers that actually paid the fixed charges"). When Columbia remits refunds to its customers, it is not paying them for goods or services rendered. Like the railroad in *Penn Central*, Columbia acts as a "receiving and transmitting agent," or a conduit, for money upstream suppliers owe to overcharged consumers.[11]

Columbia did not maintain separate cash accounts for the various refunds it received, it did, however, meticulously track its refund obligations by maintaining over one hundred separate paper accounts. The bankruptcy court found, and no one challenges this finding as clearly erroneous, that segregating the numerous refunds would be a huge administrative burden and economically inefficient. Therefore, as in *Penn Central*, Columbia's commingling of trust funds and general revenues has little significance concerning whether the refunds are held in trust.

To distinguish *Penn Central*, the Committee of Unsecured Creditors stresses that Columbia pays interest to its customers for the period during which it retains the refunds. Although a fixed rate of interest generally evidences a debt rather than a trust, unique circumstances make the fixed interest payments of minimal importance in this case. Interest payments indicate a debtor-creditor relationship because they are the usual contractually negotiated *quid pro quo* for a loan. Here, the NGA mandates the payment of interest, and FERC sets the interest rate.

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[11] At oral argument, FERC asserted that although the Commission had never taken a clear position, it believed it possessed authority to order the outstanding refunds to be paid by the upstream suppliers directly to the local distribution companies. This potential ability to bypass Columbia underscores that Columbia has no equitable interest in the refunds.

See 15 U.S.C. § 717c(e); 18 C.F.R. § 154.67(c)(2). Columbia's customers never consented to lend it money in exchange for a negotiated interest rate. Therefore, the payment of interest is not probative of a debtor-creditor relationship.

United Gas Pipe Line Company v. FERC, 657 F.2d 790 (5th Cir. 1981), highlights the difference between FERC-ordered refunds and loans. In that case, pipelines challenged a FERC order to pay a specific interest rate, tied to the prime rate, on refunds. The pipelines argued that the interest rate should be based on the credit terms they could obtain in a competitive market. The court refused to accept any analogy between refunds and commercial loans, explaining, "[t]here is no suggestion that energy consumers, who ultimately pay the excessive charges, would jump at the opportunity to lend money to oil companies, and, in any case they never have that choice." *United Gas*, 657 F.2d at 795.

Our conclusion that Columbia holds the customer refunds in trust is strengthened by *In re United Milk Products Co.*, 261 F. Supp. 766 (N.D. Ill. 1966). There, a federal regulatory program mandated that milk producers receive a uniform price for milk. To achieve this end, milk bottlers paid certain monies into a producer settlement fund, and manufacturers of milk products withdrew from the fund and passed this money through to their milk suppliers. United Milk, a milk product manufacturer, filed for bankruptcy and subsequently received payments from the fund, which it deposited in its general revenue bank account. The question before the court was whether this money should be deemed property of the bankruptcy estate.

The court in *United Milk* held that the fund payments were not property of the estate because the "debtor merely held them as a conduit, having an obligation to remit same to the producers." *United Milk*, 261 F. Supp. at 768. The court more fully described the function of the debtor:

> [T]he debtor has no independent right to the sums but is merely serving the function of a delivery agent, transferring money from the bottling handlers, through the Producer Settlement Fund, to the raw milk producers who are entitled to a uniform price whatever ultimate use is made of their product. . . .
>
> [T]he remaining unsecured creditors should not be permitted to share in monies in which the debtor has no direct financial interest and which it would not have been permitted to retain for its own use.

Id. Characterizing the creditors' request to include the fund payments in the debtor's bankruptcy estate as an attempt "to stop a continuing 'motion picture' at a single 'frame,'" the court "looked to the end of the reel" and directed that the money be remitted to the milk producers as directed by the original "script." *Id.*

We find the reasoning in *United Milk* persuasive and follow it here. Just as the milk funds were created to ensure that producers receive a uniform price, the refunds here were ordered to ensure that customers are charged a just and reasonable rate. Most significantly, the statutory mechanisms of paying one entity which then forwards the money to the ultimate intended beneficiary are also identical.

Conceding that "[s]uperficially, *United Milk* resolves the questions against the [Creditors'] Committee," the district court then distinguished that case. App. at 108. In *United Milk*, the government, through the Department of Agriculture, issued the check to the debtor. In this case, the money only passed through the hands of private parties.[12] This is a distinction without a difference. Co-

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[12] The Creditors offer another distinction—that *United Milk* involves government grant money. This is simply incorrect. Although the Department of Agriculture managed the producer fund, the money was paid by private parties, the milk bottlers, and belonged not to the government but to the producers. *See United Milk*, 261 F. Supp. at 768.

lumbia's property rights in the refunds should not depend on the government's role, if any, in routing this money to the proper recipient. Otherwise, these refunds would be part of the bankruptcy estate, but if the upstream pipelines paid the refunds to FERC, which then forwarded the money to Columbia for distribution, the money would be excluded from Columbia's estate. We see no principled reason for such a distinction.

Applying federal common law, we hold that the customer refunds already received and those to be received are excluded from Columbia's bankruptcy estate under section 541(d) of the Bankruptcy Code.

III. *GRI CHARGES*

Having outlined the federal common law test to determine whether monies are held in trust, we now apply the same analysis to the GRI surcharges.[13] GRI, a non-profit organization that conducts research and development projects for the gas industry, receives the vast majority of its budget through FERC-approved surcharges on gas delivered through regulated pipelines. The procedural mechanism to collect these surcharges is very similar to the method for distributing the customer refunds. Each pipeline, including Columbia, collects a separately identified charge from its customers and then remits this money to GRI. Pursuant to federal regulations, Columbia must track monies collected on behalf of GRI in a separate paper account. See 18 C.F.R. Pt. 201, § 188. GRI does not provide any products or services directly to Columbia, and Columbia does not owe GRI money until it actually collects the charges from its customers. Columbia merely collects money from its customers on behalf of GRI.

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[13] All parties assume that if federal common law governs the status of the customer refunds, the same body of law will determine whether the GRI charges and upstream payments are held in trust. We assume without deciding that this is true.

The argument for the GRI surcharges being held in trust is even stronger than the argument for the customer refunds being held in trust. FERC requires that GRI surcharges collected by Columbia be forwarded to GRI within fifteen days. *See Gas Research Institute—Opinion No. 226, supra,* at 61,705. Additionally, Columbia pays no interest to GRI during the short period of time it retains the money.[14] We conclude that Columbia acts as a conduit with respect to GRI surcharges, and has no equitable interest in these funds.

IV. *UPSTREAM PIPELINE PAYMENTS*

Finally, we apply the constructive trust analysis to the payments Columbia seeks to make to upstream gas suppliers and transporters for pre-petition goods and services provided. Columbia purchases natural gas from upstream pipeline suppliers, including appellants Ozark Gas Transmission System and Ozark Finance Corporation (collectively "Ozark"). It pays these suppliers based on their costs. The Transportation Cost Recovery Adjustment ("TCRA") provision of Columbia's tariff, on file with FERC, separately itemizes Columbia's costs relating to upstream pipeline charges. The rate making process allows Columbia to recover its TCRA costs on a dollar-for-dollar basis from its customers and to retain a reasonable rate of return.

The obligations owed to upstream pipelines clearly are debts. Columbia owes the upstream pipelines money for goods and services they have provided to Columbia. Although Columbia's customers pay the charges of the upstream suppliers dollar-for-dollar through Columbia's rates, the chronology of the flow of money is totally different from the customer refunds and GRI surcharges.

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[14] Although the fact that Columbia does not pay interest on the GRI surcharges is not part of the bankruptcy or district court record, we will take judicial notice of this undisputed fact. *See* Fed. R. Evid. 201(b)(2).

The bankruptcy court found Columbia pays upstream suppliers and *subsequently* recovers its costs from its customers.[15] Since Columbia pays the upstream suppliers before it receives money from its customers, Columbia does not act as a conduit or a collecting agent for the upstream supplier.hhC The upstream pipelines are in the the same position as every other unsecured creditor.

Most retailers purchase a product from wholesalers and calculate the price at which they will resell the product to the public based on the wholesale cost plus a mark-up percentage. The fact that Columbia charges its customers based on its cost of purchasing natural gas plus a mark-up does not distinguish it from any other retailer. The upstream pipelines have supplied a product and services to a company that filed bankruptcy, and they must share the risk of bankruptcy with all other creditors.[16]

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[15] Although Ozark did not request that the bankruptcy court reconsider this factual finding, it now contends that the finding is clearly erroneous. To support this claim, Ozark points only to the testimony of Mr. Kettering, senior vice-president of Columbia. Mr. Kettering stated that "we collect from our customers dollar for dollar for the amounts that we, *in turn*, pay to some upstream pipeline." App. at 243 (emphasis added). Although the phrase "in turn" intimates that the customers paid upstream costs before Columbia paid the upstream pipelines, Mr. Kettering was not responding to a question about the timing of the payments, and this isolated statement does not establish clear error. At oral argument, counsel for Ozark even conceded that "the testimony is not absolutely clear." Transcript of Oral Argument at 33. In any event, our ultimate conclusion, that the money owed to upstream pipelines is ordinary debt, would not change even if Columbia received the money from it customers and then forwarded it to the upstream pipelines.

[16] Since there is no concrete threat that the upstream pipelines will stop supplying gas to Columbia, we also reject Columbia's argument that paying upstream pipelines is "necessary or appropriate" to Columbia's reorganization under 11 U.S.C. § 105(a).

V. *LOWEST INTERMEDIATE BALANCE TEST*

Our decision that the customer refunds and GRI charges are held in trust does not automatically entitle Columbia's customers and GRI to full payment of the amounts they are owed. To protect the interests of secured and unsecured creditors, beneficiaries of trust funds bear the burden of identifying and tracing their trust property. *See Lehigh*, 657 F.2d at 579.

When a trustee commingles trust funds with other monies in a single account, the lowest intermediate balance rule aids beneficiaries in tracing trust property. *See* 4 L. King, *Collier on Bankruptcy* ¶ 541.13, at 79-80 (1993); 5 A.W. Scott & W.F. Fratcher, *The Law of Trusts* § 518, at 634-36 (4th ed. 1989); Restatement (Second) of Trusts § 202 cmt. j (1959). The lowest intermediate balance rule, a legal construct, allows trust beneficiaries to assume that trust funds are withdrawn last from a commingled account. Once trust money is removed, however, it is not replenished by subsequent deposits. Therefore, the lowest intermediate balance in a commingled account represents trust funds that have never been dissipated and which are reasonably identifiable. Many courts of appeals have embraced the lowest intermediate balance test to determine trust beneficiaries' rights in a commingled account. *See, e.g., First Federal of Michigan v. Barrow*, 878 F.2d 912, 916 (6th Cir. 1989); *Connecticut General Life Ins. v. Universal Ins. Co.*, 838 F.2d 612, 619 (1st Cir. 1988); *see also United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1159 (2d Cir. 1986) (allowing government to choose to apply lowest intermediate balance test or another test to commingled account containing drug money).

We have never specifically accepted or rejected the lowest intermediate balance test. In *Lehigh*, however, the bank account that contained interline revenues held in trust had been completely dissipated. *Lehigh*, 657

F.2d at 579. We held that the railroads, the beneficiaries of the trust, could not identify any trust funds and therefore could not receive any payments before the other creditors. *See id.* The court in Lehigh acknowledged that beneficiaries lose all property rights in a commingled account when the account is completely dissipated. It requires only a narrow extension of this holding to conclude that a trust beneficiary also loses property rights in a commingled account *to the extent* that the account drops below the amount held in trust.[17] This is the essence of the lowest intermediate balance test.

To apply the lowest intermediate balance test to the customers refunds and GRI surcharges, we must analyze separately the refunds and surcharges that Columbia received pre-petition and those it received and will receive after the bankruptcy filing. When Columbia filed for bankruptcy, the $3.3 million in its general account was insufficient to satisfy its pre-petition obligations to its customers and GRI. The bankruptcy court found that this amount represents the lowest intermediate balance in the general account, and no party has challenged this finding as clearly erroneous. Therefore, Columbia may distribute only the $3.3 million on a pro rata basis to its customers and GRI to satisfy its pre-petition obligations. The remainder of its pre-petition obligations to its customers and GRI will be unsecured debt.

The bankruptcy court also found that no evidence suggests Columbia's post-petition refund or surcharge obligations were ever or will ever be greater than its cash balance in the general account. Therefore, assuming Columbia continues to track these obligations through its accounting system, Columbia may pass through future

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[17] Our adoption of the lowest intermediate balance test necessarily reflects our disapproval of lower court decisions inconsistent with our holding. *See, e.g., In re New York, Susquehanna and Western Railroad Co.*, 17 B.R. 905 (D.N.J. 1981).

customer refunds and GRI surcharges to its customers and GRI respectively.

VI. *CONCLUSION*

For the foregoing reasons, we will reverse in part and affirm in part the order of the district court, and remand for further proceedings consistent with this opinion.

NYGAARD, *Circuit Judge,* concurring and dissenting.

I concur in the court's opinion, except Part II.B. where the court concludes that the FERC-ordered refunds are held in trust, and Part V. where it applies the lowest intermediate balance test to limit the amount of those refunds Columbia may pass through to its customers. Because I believe that we should not apply traditional trust law in an area that is clearly unsuited for its application, I write separately.

Central to the court's analysis is *In re Penn Central Transp. Co.*, 486 F.2d 519 (3d Cir. 1973) (in banc). There we confronted the issue of whether, under an industry-wide accounting system, railway carriers had any equitable interest in money collected for each other. Although we noted that a "common sense interpretation of this system would indicate that funds collected by one railroad for and in behalf of another railroad are held in trust by the collecting railroad," *id.* at 524, we went on to apply the analytic framework of traditional state trust law. A trust is defined as a fiduciary relationship with respect to property, subjecting the person with legal title to equitable duties to deal with the property for the benefit of another person, "which arises as a result of a manifestation of an *intention* to create it." Restatement (Second) of Trust, § 2 (1959) (emphasis added). The parties' manifestation of intention is the ultimate touchstone of whether or not a trust exists. *Penn Central,* 486 F.2d at 524.

Since the individual railway carriers had not signed trust agreements with each other, manifesting "an intention" to create trusts, the *Penn Central* court had to consider other indicia of a trust relationship. We opined, "Especially important in the present case are (1) the absence of any payment of interest on monies collected during the time they are held by the collecting railroad, and (2) the commingling of the monies with general funds by the collecting railroad." *Id.* Although the rail-

ways commingled collected money with their own accounts, and while generally commingling indicates a debtor-creditor relationship and not a trust, we concluded that commingling was not necessarily conclusive and that it had minimal significance in the extraordinary operation of interline railroads. *Id.* at 524-25. We found the absence of any provision for the payment of interest by the collecting carriers more significant. We noted, "A debtor-creditor relationship entails the right to use another's money, the usual quid pro quo for which is the obligation to pay interest." *Id.* at 524.

The concurrence in *Penn Central* opined that the application of traditional law of trusts to a complex industry governed by pervasive federal regulations may not always be suitable because there exists "the possibility that, in another case, the *absence* of any of the traditional indicators of a trust relationship" may dictate a conclusion contrary to the congressional intent behind the creation of a pervasive system of federal regulations. *Id.* at 532-33 (Adams, J., joined by Weis, J.) (emphasis in original). This appeal is such a case.

None of the traditional indicia of a trust relationship identified by the *Penn Central* court is present here. As expected, there are no separate, express trust agreements. And like the railway's accounting system, Columbia employed a combined cash management system which commingled funds. This was necessitated by the impracticalities of maintaining different accounts for every business purpose. Applying *Penn Central's* reasoning that commingling of funds "is only one indicium and . . . not necessarily conclusive," *id.*, this court concludes that commingling does not preclude a finding of a trust. As for the payment of interest or lack thereof, the dispositive factor in *Penn Central*, the majority tells us that the payment of interest here is also not important because it does not manifest an intention to create a debtor-creditor

relationship instead of a fiduciary relationship because here a statutory provision mandates the interest payments.

I agree with the court to the extent that commingling of funds and payment of interest do not preclude a conclusion that Columbia has no equitable interests in these FERC-mandated refunds under 11 U.S.C. § 541(d). I disagree, however, with the application of trust law when it is clearly unsuited to this issue. When nothing indicates one way or the other whether the parties intended to create a trust, and moreover, Columbia by seeking to distribute these refunds to the customers was simply trying to obey the law, there is no good reason to apply the law of trusts, which after all is predicated upon the intentions of the parties to create a fiduciary duty. Instead, we should balance the competing policies and try to discern the *congressional* intent behind the Bankruptcy Code, 11 U.S.C. § 541(d), and the Natural Gas Act (NGA), 15 U.S.C. § 717 et seq. See *id.* at 533 (concurrence).

Section 541(d) nowhere refers to "trusts"; it provides that if a debtor does not have "any equitable interest" in the property, that property does not become a part of the debtor's estate. A finding of an equitable interest in the FERC-mandated refunds would contravene not only the policies of the NGA, but also the Bankruptcy Code. Under the NGA, all rates and charges must be "just and reasonable," 15 U.S.C. § 717c(a), and Congress empowered FERC to ensure this. If a natural gas company overcharged its customers, FERC may order refunds. *Id.* § 717c(e). After all, these refunds belong to the customers. A natural gas company *must* pass the refunds to its customers upon pain of civil or criminal penalties. See *id.* § 717s(b), 717t. Thus, even without the benefit of the law of trusts, it is clear these refunds arise from a federal statute: they were ordered by a federal agency empowered by Congress; they must be passed through to the customers lest the holder violate the law; therefore, they belong solely to the customers under federal law.

It is undisputed that under the ordinary workings of the NGA Columbia would have no equitable claim to FERC-ordered refunds. See *Texas E. Transmission Corp.*, 39 F.P.C. 630, 642, affirmed, 414 F.2d 344 (5th Cir. 1969); *In re Area Rate Proceeding*, 53 F.P.C. 821, 822 (1975). The creditors, however, appear to argue that Columbia has some equitable interest in the refunds under the Bankruptcy Code; that is, the Code somehow intervenes in the normal regulatory workings of the NGA. But to say that the Code alters the equitable interests of the parties in the refunds is to say that it creates or alters property rights. This then contravenes the policy of the Code, which creates a set of procedures by which a debtor's property is divided, but which does not create substantive property rights. See *In re Nejberger*, 934 F.2d 1300, 1302 (3d Cir. 1991); L. King, Collier on Bankruptcy, ¶ 541.02[1], at 541.10.1 to -11 (15th ed. 1993). Neither the NGA nor the Code mandates that Columbia has "any equitable interest" in the FERC-ordered refunds, and since they are not a part of the debtor's estate, the creditors have no interest in them.

If the issue is simply whether Columbia has an equitable interest under section 541(d) in the refunds, then, so long as we agree that it does not have such an interest, *how* the court gets to this conclusion may appear academic. It is not. By applying the law of trusts, the majority bootstrapped itself into applying the "lowest intermediate balance" test. That test is premised on the principle that whenever trust funds are commingled and cannot be traced, and all the money is later withdrawn, the trust fund is treated as lost even though funds are later deposited into the account. *Connecticut Gen. Life Ins. v. Universal Ins. Co.*, 838 F.2d 612, 619 (1st Cir. 1988). So, in cases where the account is reduced to a sum less than the trust fund, the test requires that the trust be considered dissipated except as to the remaining balance. *Id.* See 4 Collier on Bankruptcy ¶ 541.13, at 541-79-80.

Columbia's normal business practice was to minimize its cash balance, and so excess money was either used to pay debts or invested. At the time the bankruptcy petition was filed, Columbia had only $3.3 million in its account, though it had received from upstream suppliers $21 and $1.8 million in prepetition refunds for the downstream customers and the GRI. Since the $3.3 million represents the lowest intermediate balance, the application of trust law to this case will result in a $19.5 million loss to the customers and GRI.

The application of the lowest intermediate balance test is both harsh and arbitrary considering the circumstances, and quite simply wrong. No one disputes that commingling of funds is necessitated by the administrative impracticality of keeping separate accounts for every business purpose. Although the majority recognizes that commingling has "little significance" in determining the existence of a trust because of business necessity, it apparently has great significance in determining the amount Columbia must refund. If business reality dictates that funds be commingled and that cash flow be fluid, which is the case with complex industries, it is arbitrary to freeze the account at the time the bankruptcy petition is filed and say that whatever money withdrawn at that time has been "dissipated." Since the filing of the petition, Columbia's cash flow has exceeded the amount of its obligations to the customers and GRI. Columbia has enough money to pass through all the refunds it received or will receive.[1] The application of the lowest inter-

[1] Even if we apply the law of trust, I note that dissipated funds may be replenished, which is what Columbia did. See Restatement § 202, comment m ("Where the trustee deposits trust funds in his individual account in a bank, and makes withdrawals from the deposit and dissipates the money so withdrawn, and subsequently makes additional deposits to his individual funds in the account, manifesting an intention to make restitution of the trust funds withdrawn, the beneficiary's lien upon the deposit is not limited to the lowest intermediate balance."). See also *In re New York, S. & W. R.R. Co.*, 17 B.R. 905 (D.N.J. 1981).

mediate balance test therefore contravenes the congressional intent behind the Natural Gas Act; under the NGA, these refunds—all of them—belong to the customers, and if Columbia has the ability to pay, trust laws notwithstanding, it should be allowed to pay in full. Thus, other than to adhere rigidly to the principles of trust laws, laws which I do not think applies to this case, there is no good reason to limit the amount of the prepetition refunds to the lowest intermediate balance. I therefore respectfully dissent from Parts II.B. and V. of the majority opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Chapter 11
Case Nos 91-803, 91-904

IN RE: THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Debtors.

Civil Action No. 92-127-SLR

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-235-SLR

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellants,

v.

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION,
Appellee.

Civil Action No. 92-236-SLR

OFFICIAL COMMITTEE OF CUSTOMERS,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-237-SLR

ENERGY DEVELOPMENT CORPORATION,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-238-SLR

WEST OHIO GAS COMPANY,
THE PEOPLES NATURAL GAS COMPANY and
VIRGINIA NATURAL GAS, INC., NATURAL GAS, INC.,
Appellants,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92--239-CLR

MERIDIAN OIL PRODUCTION, INC.,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-240-SLR

OZARK GAS TRANSMISSION SYSTEM and
OZARK FINANCE CORPORATION,
Appellants,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-241-SLR

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-242-SLR

MARYLAND OFFICE OF PEOPLE'S COUNCIL,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-243-SLR

PUBLIC UTILITIES COMMISSION OF OHIO,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

OPINION

Dated: July 6, 1992

Wilmington, Delaware

Sue L. Robinson, U.S. District Judge

Jurisdiction

The Court has jurisdiction of these appeals and cross-appeals of the Bankruptcy Court's decision of February 13, 1992 pursuant to 28 U.S.C. § 158.

Introduction

On July 31, 1991 ("Petition Date"), Columbia Gas Transmission Corporation ("TCo") filed a petition for reorganization under Chapter 11 of the Bankruptcy Code

with the Bankruptcy Court for the District of Delaware ("the Bankruptcy Court"). 11 U.S.C. § 1101. (C.A. No. 92-127, Docket Item, "D.I.", 37) TCo, a Delaware corporation, continues to manage and possess its property as a debtor in possession.[1] 11 U.S.C. § 1107, 1108. Neither a trustee nor an examiner has been appointed in the case. (C.A. No. 92-127, D.I. 37)

TCo and its affiliates comprise one of the largest natural gas systems in the United States. (C.A. No. 92-127, D.I. 69, Ex. 1, Petition for Bankruptcy) This conglomerate includes the parent public utility holding company CG, the service company TCo, and eighteen other operating subsidiaries, all of which are engaged predominantly in the exploration and production, purchase, storage, transmission, and distribution of natural gas at wholesale and retail, as well as related resource development. (C.A. No. 92-127, D.I. 69, Ex. 1; D.I. 37) Several of CG's subsidiaries are gas utility companies serving businesses and homes in their respective states. TCo transports and sells gas at wholesale to affiliated and unaffiliated companies through its 18,900 mile pipeline network. TCo serves parts of thirteen Northeastern, Middle Atlantic, Midwest and Southern states and the District of Columbia. To meet its obligations, TCo purchases natural gas from producers in the Southwest, Mid-Continent and Appalachia and from other interstate pipelines. (C.A. No. 92-127, D.I. 37) TCo also operates underground natural gas storage facilities where it offers storage servces to affilated and unaffiliated customers and provides for its own storage needs. The operation is so pervasive that "[o]ver one out of every seven gas customers in the United States is served

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[1] TCo is a wholly-owned subsidiary of The Columbia Gas System, Inc. ("CG"), which also filed on the Petition Date for Chapter 11 reorganization in the District of Delaware. (C.A. No. 92-127, D.I. 69, Ex. 1; D.I. 37) CG is a Delaware corporation and a public utility holding company. As a debtor in possession, CG continues to possess and manage its properties. (C.A. No. 92-127, D.I. 37).

either directly or indirectly" by TCo or a CG affiliate. (C.A. No. 92-127, D.I. 69, Ex. 1, Affidavit in Support of Chpt. 11 Petition).

TCo's operations are extensively regulated by the Federal Energy Regulatory Commission ("FERC"), pursuant to the Natural Gas Act of 1938 ("NGA"), 15 U.S.C. § 717; 15 U.S.C. § 717(c) (1984). FERC ensures that the rates and charges of a natural gas company are just and reasonable. 15 U.S.C. § 717c(a). FERC also regulates the prices TCo can charge its customers, the areas that may be served, the services that TCo can provide and the terms pursuant to which services are provided. (C.A. No. 92-127, D.I. 37) Since TCo is not exclusively involved in the purchase, sale, storage and transportation of natural gas in interstate commerce, it is not subject to utility regulation by state public utility commissions.

On August 23, 1991, TCo moved the Bankruptcy Court for authorization to comply with its FERC gas tariff and the orders and regulations of FERC to pay certain unsecured prepetition obligations in advance of a confirmed plan of reorganization (the "FERC" motion"). Specifically, TCo sought relief in seven areas, with four issues eventually resolved by settlement or court order. The remaining three, however, form the basis of the appeals and cross-appeals at bar: 1) whether TCo can pay prepetiton charges billed to TCo's upstream pipeline suppliers and transporters, which charges are fully recoverable from TCo's customers if paid; 2) whether TCo can pay prepetition charges to the Gas Research Institute ("GRI") that are fully recovered in TCo's filed FERC tariff; and 3) whether TCo can flow through to its downstream customers refunds received by TCo from upstream pipelines relating to prepetition amounts over-recovered by such upstream pipelines pursuant to FERC orders.

The FERC motion was supported, *inter alia*, by the Customer Committee ("the Customers"), intervenors Pennsylvania Public Utility Commission, Maryland Pub-

lic Service Commission, Public Utilities Commission of Ohio, Maryland Office of People's Counsel, CG and other local distributors. The Unsecured Creditors Committee ("the Committee") and other unsecured creditors opposed the motion. The issues were briefed extensively. The Bankruptcy Court held evidentiary hearings on October 18, October 22 and November 27, 1991. Supplemental post-hearing briefing was entertained.

By Memorandum Opinion of February 13, 1992 the Bankruptcy Court granted the FERC motion in part and denied relief in part. *In the Matter of the Columbia Gas System, Inc.*, 136 B.R. 930 (Bankr. D.Del. 1992). On February 25, 1992, the Committee [2] filed its Notice of

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[2] The following appeals and cross-appeals were filed: *The Official Committee of Unsecured Creditors of the Columbia Gas Transmission Corporation v. The Columbia Gas System, Inc. and Columbia Gas Transmission Corp.*, C.A. No. 92-127 (the Committee's emergency appeal of court's 2-13-92 order authorizing TCo to pay certain customer refunds); *Columbia Gas Systems, Inc. v. Unsecured Creditors Committee*, C.A. No. 92-235 (TCo's appeal of court's 2-13-92 order authorizing, *inter alia*, TCo to pay certain customer refunds); *Official Committee/Customers v. Columbia Gas Systems, Inc. and Columbia Gas Transmission Corp.*, C.A. No. 92-236 (Customer's appeal of court's order granting in part TCo's motion to pay prepetition customer refunds and gas research institute surcharges, granting TCo's motion to pay post-petition customer refunds and denying motion to pay upstream charges); *Energy Development Corp. v. Columbia Gas Systems, Inc, and Columbia Gas Transmission Corp.*, C.A. No. 92-237 (Energy Development Corp.'s cross-appeal of court's 2-13-92 order authorizing TCo to comply with FERC gas tariff and order and regulations of the FERC); *West Ohio Gas Co., Virginia Natural Gas, Inc. and Peoples Natural Gas Co. v. Columbia Gas Systems, Inc. and Columbia Gas Transmission Corp.*, C.A. No. 92-238 (joint appeal of 2-13-92 court order granting in part and denying in part TCo's FERC motion; specifically paragraph one as it denies TCo's motion to pay customer's category one refunds and prepetition gas research institute surcharges in excess of $3.3 million); *Meridian Oil Production, Inc. v. Columbia Gas Systems, Inc., and Columbia Gas Transmission Corp.*, C.A. No. 92-239 (Meridian's cross-appeal of 2-13-92 order authorizing TCo to comply with FERC gas tariff

Appeal with the Court and then moved for an emergency stay pending appeal. (C.A. No. 92-127, D.I. 1). By Memorandum Opinion of March 10, 1992, the Court granted the stay pending an expedited appeal. *In re Columbia Gas System, Inc. and Columbia Gas Transmission Corp.*, C.A. No. 92-127, 1992 U.S. Dist. LEXIS 3253 (D.Del. 1992); (C.A. No. 92-127, D.I. 18). A scheduling conference was held on March 23, 1992, where accelerated briefing was ordered. (C.A. No. 92-127, D.I. 31). On May 5, 1992, oral argument on the expedited appeal was held.

Although we find the Bankruptcy Court's decision to be a pragmatic one, we respectfully disagree with its conclusion that a trust relationship exists between TCo and its customers vis-a-vis the FERC ordered payments. With respect to upstream pipeline charges, we agree with the result reached by the Bankruptcy Court, but for different reasons do not find a trust relationship evident. Accordingly, for the reasons that follow, the decision is reversed in part and affirmed in part.

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and orders of FERC); *Ozark Gas Transmission System and Ozark Finance Corporation v. Columbia Gas Systems, Inc. and Columbia Gas Transmission Corp.*, C.A. No. 92-240 (Ozark's appeal of 2-13-92 order authorizing *inter alia* TCo to pay certain customer refunds); *Pennsylvania Public Utility Commission v. Columbia Gas Systems, Inc. and Columbia Gas Transmission Corp.*, C.A. No. 92-241 (Pennsylvania's cross-appeal of 2-13-92 order authorizing, *inter alia*, TCo to pay certain customer refunds); *Maryland Office/People's Council v. Columbia Gas Systems, Inc., and Columbia Gas Transmission Corp.*, C.A. No. 92-242 (Maryland's cross-appeal of 2-13-92 order authorizing TCo, *inter alia*, to pay certain customer refunds); *Public Utilities Commission/Ohio v. Columbia Gas Systems Inc. and Columbia Gas Transmission Corp.*, C.A. No. 92-243 (cross-appeal of 2-13-92 order authorizing, *inter alia*, TCo to pay certain customer refunds; Tennessee Gas Pipeline Company's Motion to Intervene was granted on April 6, 1992 (C.A. No. 92-127, D.I. 43)). In view of the commonality of challenges to the bankruptcy court's February 14, 1992 memorandum opinion and order, the cases were reviewed together.

SCOPE OF REVIEW

The Bankruptcy Court's decisions of law are subject to *de novo review. Meridian Bank v. Alten,* 958 F.2d 1226, 1229 (3d Cir. 1992); *In re: The Columbia Gas System, Inc. and Columbia Gas Transmission Corp.,* C.A. No. 92-127, 1992 U.S. Dist. LEXIS 3253 (D.Del. 1992); *In Re Public Service Co. of New Hampshire,* 116 B.R. 347, 349 n.2 (Bankr. D.N.H. 1990); *In re Pacor,* 110 B.R. 686, 687 (E.D. Pa. 1990). A district court will not set aside findings of fact unless clearly erroneous. *First American Bank of New York v. Century Glove,* 81 B.R. 274, 277 (D.Del. 1988), *aff'd in part* 860 F.2d 94, 100 (3d Cir. 1988); *United States v. Owens,* 84 B.R. 361, 363 (E.D. Pa. 1988); Bankruptcy Rule 8013. Where "findings of fact are based on an incorrect legal standard, those findings are subject to plenary review on appeal." *Century Glove,* 81 B.R. at 278. The Court must further " 'break down mixed questions of law and fact applying the appropriate standard for each component.' " *Meridian Bank v. Alten,* 958 F.2d at 1229, *quoting In re Sharon Steel Corp.,* 871 F.2d 1217, 1222 (3d Cir. 1989). A "mixed question of law and fact is found whenever a legal precept is applied to the sum of the facts of the case." *Meridian Bank v. Alten,* 958 F.2d at 1229.

BACKGROUND

After three days of hearings on the FERC motion, the Bankruptcy Court delineated facts that we find are not clearly erroneous. The court found that TCo sells gas to local distribution companies or other customers. 136 B.R. at 932. Each business relationship consists of an executed "contract, relating to either the purchase, storage, transportation or sale of gas." *Id.* TCo's rate charges vary from customer to customer; generally, however, TCo "sells or transports about one billion decatherms [(a measure of the amount of gas needed to produce a certain amount of heat)] of gas per year." *Id.*

TCo's gas operations are governed by the NGA and the powers of the FERC. The Bankruptcy Court found that FERC's ratemaking procedure is delineated in 18 C.F.R. Part 154 (1991). *Id.* "If FERC determines that a rate TCo is charging a customer is too low, FERC cannot retroactively increase the rate that TCo charges a customer." *Id.* Rather, FERC "adjusts for the discrepany on a dollar-for-dollar basis in prospectively setting TCo's rates." *Id.* Conversely, when a rate to a customer is deemed excessive, FERC can order refund disbursement and adjust rates prospectively. *Id.*[3] A "compilation of the rates TCo charges its various customers along with copies of its service agreements comprises TCo's 'tariff,' a multi-volume book." *Id.* "TCo's contracts with its downstream customers usually incorporate the applicable terms and conditions from its tariff." *Id.*

The purchased gas adjustment and the general rate are the two components of TCo's gas rate for each customer. *Id.* The former "reflects the cost of gas (price per decatherm times decatherms sold) (TCo purchases from each supplier." *Id.* Because TCo cannot predict exactly the purchased gas adjustment costs, TCo is required to file estimated purchase costs every three months. Yearly, the purchased gas adjustment costs are compared by FERC with actual costs and FERC reconciles rates by adjusting them accordingly. Generally, TCo is not allowed to profit from the purchased gas component. The Bankruptcy Court found that the purchased gas adjustment is not required by the NGA; however, since 1972 it has been used extensively and is recognized by the gas industry as a way for TCo to "pass through" its purchase gas adjustment costs to its customers. *Id.*

The other gas rate component, the general rate, includes TCo's "internal non-gas costs, other charges, and a FERC-authorized rate of return (about 13% in the Fall of 1991) based upon the Federal Reserve prime rate."

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[3] FERC also reviews and modifies the rates gas suppliers charge.

136 B.R. at 933. Should TCo contemplate a general rate increase, it must forward a proposal, as well as supporting information to FERC, which issues an order within 30 days. If FERC approves the proposed increase, it is "subject to refund." *Id.* Thereafter, "FERC conducts a due process hearing, reviews the filing, reconciles it with TCo's actual non-purchase costs, and determines whether TCo has under-recovered or over-recovered its costs for a given period of time." *Id.* TCo can be ordered to refund amounts noted as over-recovered and prospectively reduce the rate should FERC conclude that a filed rate was unjust. "Refunds include interest from the date of collection at a rate based on the prime rate." *Id.* The timing and method of refunds is addressed by tariffs.

The Bankruptcy Court found that the natural gas industry experienced pervasive problems in the mid-1980's when the price of gas dropped substantially. Consequently, many contracts with higher than market prices between pipelines and producers became uneconomical. To reduce the financial burdens incurred, FERC allowed pipelines to reform their contracts with producers by either buyouts or buydowns. In 1987, FERC developed Order No. 500 which permitted TCo's upstream pipelines to recover, subject to refund, a portion of the costs associated with the buyouts and buydowns by passing through this portion to their downstream customers. *Id.* While pipelines have been utilizing the pass through mechanism since 1987, Order No. 500 has been the subject of extensive litigation, *Associated Gas Distributors v. FERC*, 893 F.2d 349 (D.C. Cir. 1989), *cert. denied* —— U.S. ——, 111 S.Ct. 277 (1990), eventually resulting in FERC's instituting Order No. 528 to ameliorate the deficiencies. This latter Order allowed TCo's upstream pipelines to pass through a much smaller portion of their buyout and buydown costs than allowed under Order No. 500. "Thus Order No. 528 anticipates that TCo, and hence its customers, will receive thousands of

distinct refunds." *Id.* Although proceedings are now underway to ascertain the exact source and period of overcharge as well as the recipient customer, the Bankruptcy Court determined that TCo and its customers are entitled to "Order No. 528 refunds totalling approximately $134 million." *Id.*

The Bankruptcy Court found other "FERC-ordered refunds that TCo wishes to honor": "These refunds total about $26.5 million, for a grand total of $160 million TCo seeks permission by its FERC motion to pass through to its customers." *Id.* On the Petition Date, the Bankruptcy Court found TCo "had received but not passed through about $21 million in FERC ordered refunds"; "[p]ostpetition, TCo expects to receive approximately an additional $140 million in refunds." *Id.* By statute, TCo is required to pay a FERC-prescribed interest on refunds already received. *Id. See* 15 U.S.C. § 717 c(e); 18 C.F.R. § 154.67(c) (1991).

The Bankruptcy Court made certain findings as to TCo's cash management and accounting systems. Described as "normal business practice," the Bankruptcy Court found that TCo daily utilized the excess of deposits over disbursements for investment or paydown of short term debt to TCo, resulting in TCo's possessing very little cash on hand. 136 B.R. at 934. On the Petition Date, TCo possessed only $3.3 million in cash. Despite this internal business practice, TCo is required to follow FERC-mandated accounting procedures. 18 C.F.R. Part 201, subchapter F. The Bankruptcy Court described TCo's management of refunds as follows:

> When TCo receives a refund, *it treats the refunds as an increase to its assets. TCo simultaneously creates a corresponding liability on its books reflecting its obligation to the corresponding customer.* As long as the refund is passed through within eight and a half months of the year in which the refund was re-

> ceived, TCo need not pay income tax on the refund asset.
>
> TCo tracks the various refunds it passes through using "accounting accounts." These accounts are not actual money accounts, but are mathematical and informational mechanisms for complying with the difficult task of sorting out its refund obligations. The accounting accounts thus segregate refunds by: 1. Source of refund; 2. Legal reason for the refund; 3. Time period to which the refund relates; and 4. Designated downstream recipient of the refund.
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> TCo maintains on the order of 100 accounting accounts.
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> *TCo, however, does not maintain separate bank accounts for the different categories of refunds. It uses a combined cash management system. This system receives cash from many different sources, and uses the cash without restriction.* The pooling of funds allows efficient utilization of cash resources and recognizes the impracticalities of maintaining separate cash accounts for the many different purposes that require cash.
>
> TCo receives refunds from upstream suppliers and transporters of gas in the form of checks, wire transfers, and billing credits. TCo normally passes through refunds in the same manner. If the FERC motion is granted, TCo will pay a portion of the refunds out of cash funds, and a portion through "billing credits" imposed upon future billings to the customers for future gas sales.

Id. (emphasis added).

Also factoring into this scenario are Gas Research Institute ("GRI") surcharges. The Bankruptcy Court determined that GRI, a "not-for-profit, tax-exempt research and scientific organization", "does not provide any direct services to TCo". *Id.* GRI funding comes from "sur-

charges that FERC imposes on the sale and transportation of gas"; "FERC regulations and orders require TCo to collect these surcharges from its customers, and then pay these amounts to GRI within 15 days." *Id.* The Bankruptcy Court found that TCo maintains separate accounting records for these charges.

Based on these facts, the Bankruptcy Court formed legal conclusions that are subject to plenary review. *In re Pacor*, 110 B.R. at 687. For analytical purposes, the Bankruptcy Court divided the refunds into two categories: 1) refunds received prepetition and to which there is a final FERC order; and 2) those refunds that TCo has received or will receive postpetition. Applying federal common law, rather than state law, the Bankruptcy Court concluded that the refunds received by TCo from its upstream suppliers were not property of the bankruptcy estate but were held in trust [4] by TCo for the benefit of TCo's downstream customers. Nonetheless, the Bankruptcy Court did not allow all of the refunds to flow through currently to the customers. Relying on trust tracing principles as enunciated in *In re Penn Central Transp. Co.*, 486 F.2d 519 (3d Cir. 1973), *cert. denied*, 415 U.S. 990 (1974), the Bankruptcy Court determined that the $3.3 million in cash possessed by TCo on the Petition Date was the lowest intermediate balance held; therefore, those refunds received prepetition, totalling $21 million in refunds and $1.8 million in GRI sur-

[4] The court's finding of a trust relationship, whereby TCo held legal title but no equitable interest in the funds for its customers, allowed the refunds to evade inclusion in TCo's bankruptcy estate. "Because the debtor does not own an equitable interest in property he holds in trust for another, that interest is not 'property of the estate.'" *Beiger v. I.R.S.*, 496 U.S. 53, ——, 110 S.Ct. 2258, 2263 (1990). 11 U.S.C. § 541(d) provides: "Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . ., becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not of any equitable interest in such property that the debtor does not hold."

charges, could be paid "only on a pro rata basis in an amount not exceeding $3.3 million." 136 B.R. at 939. As to refunds received postpetition, the Bankruptcy Court found TCo had proved sufficient cash resources to pay present and future obligations and, therefore, allowed those refunds to pass unlimited. The Bankruptcy Court then denied the motion, however, to allow upstream payments because there was no trust relationship demonstrated. The Bankruptcy Court concluded that the upstream payments were for goods and services already received from TCo. More significantly, the monies TCo would use to pay upstream suppliers have not yet been collected from downstream customers; current upstream payments, therefore, could not be traced to a particular source. *Id.* at 940.

In adjudicating refunds and upstream surcharges, the Bankruptcy Court rejected TCo's advancement of 11 U.S.C. §§ 105 and 1108 for authority to order such payments. TCo argued that inability to make the payments would jeopardize its relationship with its customers and, ostensibly, interfere with its efforts to reorganize under Chapter 11. The Bankruptcy Court found as a matter of law that TCo's allegations were insufficient. Specifically, the Bankruptcy Court concluded that TCo had failed to demonstrate the necessity of such payments to compel use of this broad power. *Id.* at 939.

ISSUE ONE: CUSTOMER REFUNDS [5]

The Committee [6] contends the Bankruptcy Court erroneously applied federal common law to establish the

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[5] For purposes of this Opinion, references to "customer refunds" include those to downstream distributors and Gas Research Institute surcharges, received prepetition and postpetition.

[6] Despite the numerous appeals and cross-appeals, the arguments essentially divide into two camps on three discrete issues. First, those arguing for reversal of the Bankruptcy Court's decision as to the finding of a trust relationship between TCo and its customers,

existence of a trust and, as a result, ignored the Bankruptcy Code's mandate of equality of distribution among creditors. (C.A. No. 92-127, D.I. 34) The Bankruptcy Court's reliance on *Matter of Lehigh and N.E. Ry. Co.*, 657 F.2d 570 (3d Cir. 1981) was misplaced, argues the Committee, for the Bankruptcy Court read the decision too broadly. The instances where a federal court can supplant state law rules of decision are rare and certainly not evident at bar. *Jaffke v. Dunham*, 352 U.S. 280 (1957); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Since neither the NGA nor the Bankruptcy Code preempt state law on the issue of trusts, *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 143 (1960); *Pennzoil Co. v. FERC*, 645 F.2d 360, 384 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982); *United States v. Kalishman*, 346 F.2d 514, 517 (8th Cir. 1965), *cert. denied*, 384 U.S. 1003 (1966), the Committee asserts that the Bankruptcy Code takes precedence over other statutes and governs in any case where there might be a conflict. (C.A. No. 92-127, D.I. 34); *United States v. Kalishman*, 346 F.2d at 517. Regardless of which law is applied, however, the Committee maintains the record is devoid of the indicia required for a trust relationship.

The Customers argue the Bankruptcy Court correctly found the existence of a trust by concentrating on the intention of the parties and the significance of the Congressionally prescribed regulatory scheme. (C.A. No. 92-

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with the alternative argument that the lowest intermediate balance trust tracing principle was applied correctly to limit the amount of refunds, are referenced as the Committee's position. In opposition, arguing for affirmance on the finding of a trust, yet reversal on the application of the lowest intermediate balance rule as applied too restrictively, are TCo and the Customers, with specific identification noted for particular points. On the second issue, arguments for reversal of the Bankruptcy Court's decision as to upstream pipeline charges are attributable to Ozark Gas. Positions in opposition shall be cited to as Meridian Oil's. Third, TCo asserts the Bankruptcy Court erred in denying relief pursuant to 11 U.S.C. §§ 105 and 1108. An opposing position is presented by the Committee.

127, D.I. 36) They assert the elaborate regulatory system mandates a flow through of refunds and this Court should not intervene to disturb the scheme. There is no conflict between FERC and the Bankruptcy Code because the latter particularly exempts monies held in trust from the effects of the Code. Moreover, the Customers argue that the Court must follow the Third Circuit's directives in *Lehigh* and *Penn Central* and apply federal common law, then weigh the elements of a trust against the record, with due regard given to the complex regulatory system. The Customers contend that the facts herein reflect a trust relationship because: 1) TCo cannot retain the money forever; 2) it is in the public's best interest to order refunds so that rates are just and reasonable; and 3) TCo merely acts as a conduit of the money which, by regulation, must pass to the customers. As to the admitted commingling of refunds with other TCo money, the Customers contend the Bankruptcy Court was correct in recognizing, as the Third Circuit did in *Penn Central,* that the system is an unpreventable consequence of modern practice. To deny refunds on this technicality would be unfair and would render rates illegal.

TCo emphasizes that the issue is not merely whether the Bankruptcy Court applied the correct law; instead, the focus must be on the complex regulatory scheme and the interests of the public which demand recognition of a trust relationship. Within this regulatory framework, FERC has concluded that the refunds must pass to the customers. The refunds do not belong to TCo. Rather, TCo acts as a mere conduit, without economic or equitable interests, collecting refunds and then passing them through to the customers. Because FERC allows the proposed rates to go into effect before calculations are made, the entire ratemaking process is constantly being adjusted retrospectively to achieve the ultimate goal of just and reasonable rates.

Essentially, then, the issue before the Court is whether the Bankruptcy Court was correct in finding that TCo

held the refunds in trust for its customers. Like the Bankruptcy Court, our analysis begins with determining whether to apply federal common law or state law principles. Generally, a debtor's interest in property rights is reviewed under state law. *Butner v. United States,* 440 U.S. 48, 54-55 (1979) (the Bankruptcy Code generally leaves the question of property rights to state law); *In re Nejberger,* 934 F.2d 1300, 1302 (3d Cir. 1991) ("We must look to state law to determine if a property right exists and to stake out its dimensions."); *In re Roach,* 824 F.2d 1370, 1374 (3d Cir. 1987) (same); *Matter of Columbia Gas System, Inc.,* 136 B.R. at 935. Accordingly, "absent a countervailing federal interest, 'the basic federal rule is that state law governs.' " *In re Roach,* 824 F.2d at 1374, *quoting Butner v. United States,* 440 U.S. at 48, 57. There are limited circumstances, however, when a federal court may develop and apply federal common law:

> [A]bsent some Congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate and international nature of the controversy makes it inappropriate for state law to control.

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (citations omitted); *Com. of Pa., Dept. of Public Welfare v. U.S.,* 781 F.2d 334, 342 (3d Cir. 1986) ("[F]ederal courts develop their own common law only where necessary to protect important federal interests, and only where Congress has not addressed the issue."); *Milwaukee v. Illinois,* 451 U.S. 304, 312 (1981)

(same); *Erie R.R. v. Tompkins,* 304 U.S. 64, 78 (1938) (there is no federal general common law); *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943) (exception to *Erie,* where federal common law applied to suit brought by the United States, related to commercial paper). Neither the second nor third circumstances are implicated by the facts at bar. The first exception, however, represents the basis for the Bankruptcy Court's departure from state law.

Relying on *United States v. Standard Oil Co.,* 332 U.S. 301 (1947) and, especially, *Matter of Lehigh and N.E. Rye Co.,* 657 F.2d 570 (3d Cir. 1981), the Bankruptcy Court concluded that federal common law applied at bar because the case involved "specialized matters of essentially a federal character," 136 B.R. at 935. An examination of *Standard Oil* and *Lehigh* against the record, however, demonstrate that the application of federal common law is misplaced.

In *Standard Oil,* the Supreme Court was faced with a choice between state or federal law in a suit brought by the government to recover expenses incurred to treat a soldier injured by a truck driven by an employee of defendant Standard Oil Company. 332 U.S. at 302. The government paid the soldier's hospital bill and continued to compensate him during his disability. The soldier had signed a release in exchange for $300.00, releasing Standard Oil and its employee of any claims or demands. *Id.* In resolving whether the government could recover the amounts expended for hospitalization and soldier's pay, the Court debated whether state or federal law applied. *Id.* at 303. After discussing a number of factors, as well as the reasons for avoiding *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938), the Court applied federal law and denied the government's attempt to create a new cause of action in the absence of Congressional mandate. *Id.* at 314-16. In so doing, the Court noted the distinctly federal question involved and the particularly federal character of the relationship between the government and members of the armed forces.

> To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between a person in service and the Government are fundamentally derived from federal sources and governed by federal authority. . . . For, as the Federal Government has the exclusive power to establish and define the relationship by virtue of its military and other powers, equally clearly, it has power in execution of the same functions to protect the relation once formed from harm inflicted by others.

Id. at 305-306. A relationship similar to the government and armed service personnel is not evident herein. Specifically, the government is a regulator of the natural gas industry and not directly involved with the refunds or the relationship between TCo and its customers. Unlike *Standard Oil,* the government is not a party, has not advanced a position on the issues and, importantly, does not have a financial interest in these private commercial transactions.

Likewise, *Lehigh* does not support adoption of federal common law. There, the Third Circuit was faced with a railroad which had entered receivership and expended all of its general funds. A group of interline railroads successfully argued that a trust relationship existed between the debtor railroad and the interline railroads and, as a result, the latter were permitted to receive prereceivership revenues. Before the court [7] was whether the priorities

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[7] The Third Circuit recently commented on the appropriate law for trust analysis in *Goldberg v. New Jersey Lawyers' Fund,* 932 F.2d 273, 280 (3d Cir. 1991). To "establish rights as a trust recipient, a claimant [bankruptcy] must make two showings: (1) demonstrate that the trust relationship and its legal source exist, and (2) identify and trace the trust funds if they are commingled. Whereas, the first showing is generally a question of state law,

established for the valuation of proceeds was correct. Prior to addressing the substantive issue, the court concluded that federal common law, rather than state law, applied:

> [T]he funds in question arose out of railroad operations in interstate commerce, the regulation of which is under the exclusive control of Congress. . . .
>
> Second, Congressional concern with the establishment and maintenance of a viable national rail system has been expressed in legislation designated to encourage and facilitate interline rail transportation, notably the Interstate Commerce Act . . . and Regional Rail Reorganization Act. . . .
>
> Third, by establishing the Interstate Commerce Commission, Congress sought to regulate interstate commerce by rail, as well as by other means. In so doing, Congress required regulation of rates among the various railroads. . . . The extent of the national interest affected by such rate regulation has been recognized by the Supreme Court in a number of cases where states themselves sought to prescribe rates in a manner that conflicted with national regulations. . . .
>
> Finally, it is manifest that uniformity is required in the manner and means by which interline freight accounts are balanced.

657 F.2d at 570, 574-75.

While the refunds herein derive from TCo's operations in the Congressionally controlled natural gas industry, the distinctions between the regulatory schemes compel rejection of federal common law. First, regulation of the natural gas industry is far less pervasive than the railroad

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the second showing 'because it pertains to distribution of assets from an entity in [a] federal bankruptcy [proceeding] is exclusively a question of federal law.' " (Citations omitted)

industry, the operations of which are governed by the Interstate Commerce Act and the Regional Rail Reorganization Act. The Supreme Court has described the difference as follows:

> [The Natural Gas Act] evinces no purpose to abrogate private rate contracts as such. . . . In this respect, the Natural Gas Act is in marked contrast to the Interstate Commerce Act [regulator of the railroads], which in effect precludes private rate agreements by its requirement that the rates to all shippers be uniform, a requirement which made unnecessary any provision for filing contracts. . . . The vast number of retail transactions of railroads made policing of individual transactions administratively impossible; effective regulation could be accomplished only by requiring compliance with a single schedule of rates applicable to all shippers. On the other hand, only a relatively few wholesale transactions are required by the Natural Gas Act and these typically require substantial investment in capacity and facilities for the service of a particular distributor. Recognizing the need these circumstances create for individualized arrangements between natural gas companies and distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.

United Gas Pipeline Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 338-39 (1956) (reviewing NGA and predecessor of FERC, the Federal Power Commission) (citations omitted); *United Gas Pipeline Co. v. Memphis, Light, Gas & Water Div.*, 358 U.S. 103, 109-110 (1958). Furthermore, while the refunds arose from FERC's perpetual retrospection of charges and rates to reconcile over and

under charges, the manner in which TCo managed the refunds internally, replete with commingling and use of the money, is not statutorily prescribed.

The explicit exemption from the general bankruptcy scheme created by Congress for the railroads is another distinction between the regulatory schemes. 11 U.S.C. § 1161, *et seq.* There is no comparable provision for the natural gas industry. Moreover, the government's interest is more intimate in the railroad industry because the government is an owner and regulator of railroads. Both Amtrak and Conrail were created by Acts of Congress, "and the federal government owns, or owned at [one] time, more than half of the respective capital stock of each entity." *In re Rail Collision near Chase,* 680 F.Supp. 728, 730 (D.Md. 1987); 45 U.S.C. §§ 501, 701. This interest was recently evidenced by the swift action of the Congress and the President to stop a national railroad strike that threatened to paralyze the economy. Joint Resolution Publ. L. No. 102-306 (June 26, 1992) ("Whereas Congress, under the Commerce Clause of the Constitution, has the authority and responsibility to ensure the uninterrupted operation of essential transportation services" and "has in the past enacted legislation for such purposes", it enacted a joint resolution "[t]o provide for a settlement of the railroad labor-management disputes between certain railroads and certain of their employees.") The rights and obligations of the government are absent in the natural gas industry. *Compare Bolye v. United Technologies Corp.,* 487 U.S. 500 (1988).

Having found the Bankruptcy Court's justification for applying federal common law uncompelling, this Court cannot apply federal law in the absence of an explicit statutory mandate. *Texas Indust. Inc. v. Radcliff Materials Inc.,* 451 U.S. 630 (1981); *Wallis v. Pan American Petroleum Corp.,* 384 U.S. 63, 68 (1966). The Natural Gas Act neither refers to the effects of bankruptcy, which implicate these facts, nor mandates application of federal

common law. *Panhandle Eastern Line Co. v. Public Serv. Comm'n,* 332 U.S. 507 (1947); *Pennzoil Co. v. FERC,* 645 F.2d 360, 384-85 (5th Cir. 1981), *cert. denied,* 454 U.S. 1142 (1982); *Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n,* 461 U.S. 375, 378 (1983) (With the NGA, "Congress undertook to establish federal regulation over most of the wholesale transactions of electric and gas utilities engaged in interstate commerce and created the Federal Power Commission . . . [now FERC] . . . to carry out that task."). There is nothing to suggest Congress intended the NGA to preempt the Code or state trust law. *Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 308 (1988) (NGA preempts "state law whose central purpose is to regulate matters that Congress intended FERC to regulate [rate-making]; . . . [E]very state statute that has some indirect effect on rates and facilities of natural gas companies is not preempted.") (citations omitted). *Compare Packers and Stockyards Act,* 7 U.S.C. § 196 (1992) (statutory trust established for protection of public interest from inadequate financing arrangements); *Perishable Agricultural Commodities Act,* 7 U.S.C. § 499(c) (1992). Nor do Order Nos. 500 and 528 provide guidance. Finally, none of these sources even discuss trusts to implicate the issues herein.

The appropriate law to apply under the NGA was recently analyzed by the Sixth Circuit in *Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement,* No. 91-3360, 1992 U.S. App. LEXIS 8840 (6th Cir. 1992), an eminent domain action filed pursuant to the NGA. Before the court was whether a commission, appointed by the district court under Fed.R.Civ.P. 71A (h), applied the correct standard for determining the compensation owed to defendants, homeowners of land used for natural gas storage. Although the case was filed pursuant to express provisions of the NGA, 15 U.S.C. § 717f (b), the Sixth Circuit nonetheless weighed whether state

or federal common law governed questions of remedy and compensation. The court commenced its analysis with *U.S. v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), a case in which the Supreme Court concluded federal law should govern where there were "competing private and federal liens . . . in the absence of a federal statutory scheme setting priorities." 1992 U.S. App. LEXIS 8840, at 7. The Sixth Circuit embraced the *Kimbell* analysis and looked to the following factors in order to determine whether courts should formulate a "uniform federal common law rule or adopt state law as the federal standard":

> (1) the need for a nationally uniform body of law, (2) whether the application of state law would frustrate specific objectives of the federal program at issue, and (3) the extent to which application of a federal rule would upset commercial relationships predicated on state law.

Id. at 7, 9-10, referencing *Kimbell,* 440 U.S. at 728-29. *Accord Kamen v. Kemper Financial Services,* 111 S.Ct. 1711 (1991), Applying *Kimbell,* the Sixth circuit first concluded that evaluation of the NGA section was a federal law issue. Then the court turned to examine the statutory language for guidance on whether to develop a federal common law as the federal standard or to utilize the law of the state where the condemned land was located. *Id.* at 13. The NGA section simplified the issue by directing the court to the " 'practice and procedure' of the state in which the subject property is located". *Id.* at 13-14. Despite the clear statutory mandate, the court looked to caselaw for additional guidance. The court's reasons for selecting state law are pertinent to the issues at bar:

> [1] [P]roperty rights have traditionally been, and to a large degree are still, defined in substantial part by state law. . . .
>
> [2] [W]e are confident that incorporating state law as the federal standard will not frustrate the specific

> objectives of the Natural Gas Act. . . . To the extent that compensation under state law might deviate from that under a federal rule, we believe this variance, in the aggregate, is far too speculative to warrant displacing state law. . . .
>
> [3] [W]e are unconvinced that fashioning a nationally uniform rule of compensation for private parties exercising their power of eminent domain under the Natural Gas Act is necessary in this case. . . . Moreover, nothing in the statutory scheme of the Act "evidences a distinct need for nationwide legal standards." . . .
>
> [4] [T]he legislative history of § 717f(h) suggests it was intended to mirror the parallel provision of the Federal Power Act. . . . The court in *Georgia Power* concluded that the Federal Power Act's legislative history warranted the application of state law.

Id. at 19-22 (citations omitted).

While the Customers urge this Court to ignore the Sixth Circuit's decision in *Columbia Gas Transmission Corp.* because the factual and legal issues are distinguishable and the holding predictable in view of the express statutory language embracing state law principles, we find the analysis helpful. First, like *Columbia Gas Transmission Corp.*, the dispute herein involves property rights which are traditionally resolved under state law. Second, the court's recognition of an absence of anything in the NGA to mandate use of federal common law based on an important federal interest lends support for our choice of state law principles as the appropriate standard for trust analysis. Indeed, the issues herein present an easier resolution than those presented to the Sixth Circuit, as we have two federal statutes, one of which (the NGA) is entirely silent on the issues of applicable law (trusts and bankruptcy), while the other (the Bankruptcy Code) directs review according to traditional state law principles.

With regard to each statute, Congress obviously has the power of clarification; we read the silence of Congress in the NGA as supporting the application of state law principles. Furthermore, where there is a conflict between the Bankruptcy Code and a competing statute, the Code, generally, takes precedence. *N.L.R.B. v. Bildisco and Bildisco,* 465 U.S. 513, 532 (1984) (conflict between National Labor Relations Act and Bankruptcy Code resolved in favor of the Code); *United States v. Randall,* 401 U.S. 513, 515 (1971) ("Bankruptcy Act . . . is an overriding statement of federal policy on this question of priorities"). *See also United States v. Kalishman,* 346 F.2d 514, 516 (8th Cir. 1965), *cert. denied* 384 U.S. 1003 (1966); *In re Chateaugay Corp.,* 944 F.2d 997, 1002 (2d Cir. 1991).

Having found no compelling reason to apply federal law, we turn to whether the facts of record establish a trust relationship under state law. The situs [8] of the alleged trust determines which state's trust law applies. *Coriell v. Hudson,* 563 F.2d 978, 980 (10th Cir. 1977). The Bankruptcy Petition [9] reflects that the refund monies were held in bank accounts in Charleston, West Virginia; Pittsburgh, Pennsylvania; New York, New York; Wilmington, Delaware; and Columbus, Ohio. (C.A. No. 92-127, D.I. 41, Ex. 1 at A21, Schedule B—Personal Property). The Third Circuit's approach to the choice of law is: "The Restate-

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[8] The Customers and TCo have not addressed which state's law applies because they submit choice of law is not determinative as the same result is reached under either standard. (C.A. No. 92-127, D.I. 77). However, they maintain, federal common law as discussed in *Lehigh* and *Penn Central* is dispositive.

[9] Since we find that the Bankruptcy Court applied the wrong standard, we apply a plenary review of the record for the limited purpose of locating the refunds, and for examining the form contracts of TCo. *Meridian Bank v. Alton,* 958 F.2d at 1226, 1229. Because the record established by the Bankruptcy Court is sufficient for examining the remaining elements of a trust, a complete plenary review is unnecessary.

ment of Trusts provides the applicable common-law rules absent contrary local rules." *Smith v. Williams,* 698 F.2d 611, 614 (3d Cir. 1983). Delaware, Pennsylvania, New York and Ohio have essentially applied the trust analysis of the Restatement. *Walsh v. St. Joseph's Home for the Aged,* 303 A.2d 691, 695 (Del. Ch. 1973); *Follansbee-Merion Historic Assoc's v. Historical Improvement Ltd. Partnership,* No. Civ. Act. 87-2763, 1989 U.S. Dist. LEXIS 8377 (E.D.Pa. 1989); *In re Fontanella,* 304 N.Y.S.2d 829, 831-32 (N.Y. App. Di. 1969); *Morris v. Investment Life Ins. Co.,* 248 N.E.2d 216, 225 (Ohio Ct. App. 1969), *aff'd* 272 N.E.2d 105 (Ohio 1971). While West Virginia has not expressly adopted the Restatement, there is no contrary local rule that would affect our review.

An "express trust is created 'only if the settlor properly manifests an intention to create a trust.' " *Coca-Cola Bottling Co. v. Coca-Cola Co.,* 769 F.Supp. 671, 712 (D.Del. 1991), *quoting Restatement (Second) of Trusts* § 23 at 66 (1959); 1 Scott on Trusts § 17 at 224 (William F. Fratcher ed., 4th ed. 1987). There must be a manifestation of intent to create a trust and a particular property or res. *In re Martin,* 35 B.R. 982, 985 (Bankr. E.D. Pa. 1984). The "settlor must express in definite terms his intention to subject himself to equitable duties to deal with the trust res for the benefit of the beneficiary." *Coca-Cola Bottling Co. v. Coca-Cola Co.,* 769 F.Supp at 712.

Essential to the existence of a trust is a distinct showing of the parties' intent.

> It is immaterial whether or not the settlor knows that the intended relationship is called a trust, and whether or not he knows the precise characteristics of the relationship which is called a trust.
>
> By manifestation of intention is meant the external expression of intention as distinguished from undisclosed intention . . .

> On the other hand, no trust is created unless the settlor manifests an intention to impose enforceable duties.

Restatement (Second) of Trusts § 23, Comment a, at 66. Moreover:

> If one person pay money to another, it depends upon the manifested intention of the parties whether a trust or debt is created. If the intention is that the money shall be kept or used as a separate fund for the benefit of the payor third person, a trust is created. If the intention is that the person receiving the money shall have the unrestricted use thereof, being liable to pay a similar amount whether with or without interest to the payor to a third person, a debt is created.

Restatement (Second) of Trusts, § 12, Comment g; *accord* Scott on Trusts, § 12.2 p.133.

Weighing these factors against the record, there is no evidence of a trust between TCo and its customers. As to an intention to create a trust relationship, the Bankruptcy Court fashioned neither factual determinations nor legal conclusions. We, therefore, review the Bankruptcy Court's findings for indicia of a trust relationship. First we review the form contracts between the customers and TCo for express language reflecting a trust relationship. (C.A. No. 92-127, D.I. 34, Ex. 2) The contracts explicitly detail the terms of billing and payments, yet significantly include no indication of a trust relationship. There have been no representations of the contracts containing express language of trust intent. Although the FERC's retrospective procedures mandate refunds, the refunds are based directly on these contracts. Likewise, the NGA, FERC Accounting System,[10] and Order Nos. 500 and 528 are devoid of express language indicating a trust.

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[10] Accounts, Natural Gas Act, 18 C.F.R. Part 201 (1991); 18 C.F.R. § 154.67.

Moreover, TCo's handling of the refunds more resembles a debtor-creditor, rather than trustee-beneficiary, relationship. Restatement (Second) of Trusts § 12, Comment g; *see, e.g., In re Delaware & H. R. Co.*, 127 B.R. 756, 757-58 (Bankr. D.Del. 1991). Specifically, TCo uses the money unrestrictedly for debt servicing and investment. Although separate accounting of refunds are kept, TCo does not maintain separate bank accounts for different categories of refunds. As the Bankruptcy Court recognized, while this commingling of funds may have promoted efficient business practices, it weighs against a trust relationship. *Elliott v. Bumb*, 356 F.2d 749, 755 (9th Cir.), *cert. denied* 385 U.S. 829 (1966). The augmentation of interest further reflects a debtor-creditor relationship. Restatement (Second) of Trusts § 12, Comment g.

Alternatively, we reach the same result applying the Bankruptcy Court's test under federal common law. In *Penn Central*, the Third Circuit enumerated the criteria of a trust relationship:

> In applying the law of trusts, it will be necessary to examine the manifestation of intent of the parties, not only in terms of written documents, but also in terms of the conduct of the parties. Especially important in the present case are (1) the absence of any payment of interest on monies collected during the time they are held by the collecting railroad, and (2) the commingling of the monies with general funds by the collecting railroad. . . . The parties' manifestation of intention ultimately controls whether or not a trust relationship exists, but failure to expressly designate the relationship as one of trust does not necessarily negate its existence. . . . When the language of the parties fails to clearly indicate their intention, it may be ascertained by other objective manifestations of intent, such as the facts and circumstances surrounding the transaction and the relationship of the parties. . . . A debtor-creditor relationship entails the right

> to use another's money, the usual quid pro quo for which is the obligation to pay interest. . . . While generally commingling indicates a debtor-creditor relationship and not a trust, it is only one indicium and it too is not necessarily conclusive.

486 F.2d at 524 (citations omitted). The Bankruptcy Court specifically found "[r]efunds include interest from the date of collection at a rate based on the prime rate." 136 B.R. 930, 933. Under the reasoning of *Penn Central*, this accrument by TCo for the customers weighs against the existence of a trust relationship. *Accord* Restatement (Second) of Trusts § 12, Comment g. As to the second criterion, commingling, the Bankruptcy Court acknowledged the sharing of resources, yet rejected its significance in view of the inherent business impracticalities of maintaining separate accounts for a discrete refund. Although the Bankruptcy Court correctly emphasized *Penn Central*'s warning against the exclusive focus on the presence of commingling to defeat a trust, we find in viewing the entire relationship—the absence of intention to create a trust relationship, the unlimited use of the refunds, the payment of interest—that the added existence of commingling vitiates any proposed trust. *In re Martin,* 35 B.R. 982, 986 (Bankr. E.D. Pa. 1984).

The only remaining theory identified in support of the Customers' position is that a constructive trust should be imposed to prevent the unfair capture of funds in the bankruptcy estate where they clearly do not belong, a theory never expressly embraced by the Bankruptcy Court. Generally, the imposition of a constructive trust is warranted only where wrongful conduct or mutual mistake has occurred and caused unjust enrichment to the wrongdoer. The trust res must also be traceable to the debtor's assets. *In re Leedy Mortgage Co.,* 111 B.R. 488, 494 (Bankr. E.D.Pa. 1990); *Adams v. Jankouskas,* 452 A.2d 148, 152 (Del.Supr. 1982). As to a constructive trust, Delaware law applies because, as a remedy, the law of the forum state controls. *McMahon v. New Castle Assocs.,* 532 A.2d 601, 608-09 (Del. Ch. 1987); *In re Chanel Finan-*

cial, Inc., 102 B.R. 549, 550 (Bankr. N.D.Tex. 1988). The Customers argue that TCo's role in connection with the refunds was extremely limited and analogous to a conduit, wherein the refunds merely passed through as one step in their journey to the real owners, the customers. Since the refunds are federally imposed, the Customers contend, this conduit relationship is a necessary consequence of the regulatory scheme. To promote fairness to the public and preserve the objectives of just and reasonable rates, they urge for imposition of a constructive trust. In support, they rely on *In the Matter of United Milk Products,* 261 F.Supp. 766 (N.D. Ill. 1966); *In re Joliet-Will County Community Action Agency,* 847 F.2d 430 (7th Cir. 1988); and *Yonkers Board of Education v. Richmond Children's Center, Inc.*, 58 B.R. 980 (S.D.N.Y. 1986). Although initially appealing, none of these case authorities are unpersuasive.

In *United Milk, the* debtor, a manufacturer of milk products from milk supplied by producers, filed a Chapter 11 bankruptcy on May 20, 1965. On that date, the Department of Agriculture mailed a check for $9,172.19 to the debtor as partial payment "of the producer settlement fund credit that accrued for milk used by the debtor in its New York plant during the April 1965 delivery period." [11] 216 F.Supp. at 767. The settlement check was received postpetition and the debtor deposited the check into its own bankruptcy account. Before the court was whether the money that had been commingled with other funds of the debtor, as well as those credits awaiting distribution, were the property of the estate. The court found that the monies were not part of the debtor's estate, that the debtor "merely held them as a conduit, having an obligation to remit the same to the [unpaid] producers" whose milk gave rise to such credits. The court analogized the debtor

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[11] Additional credits were also held by the Department of Agriculture, Market Administrator.

to a delivery agent, without right to the monies and viewed the entire transaction as a "continuing motion picture" and refused to stop at a "single frame" to decide the issue.

The Customers contend the relationship between the debtor and the refunds at bar is similar to that reviewed in *United Milk* and, therefore, the Court should focus on the entire transaction, the intent of the parties and the natural gas regulatory scheme. This complete picture, argue the Customers, reflects that refunds were held by TCo temporarily and should not be trapped within the estate merely because they were not flowed through before TCo entered bankruptcy. Also pertinent, argue the Customers, is that *United Milk* imposed a trust relationship despite the presence of a clear commingling of monies.

Superficially, *United Milk* resolves the questions against the Committee; however, a significant distinction precludes application. In *United Milk,* the government was directly involved, as the Department of Agriculture issued the check postpetition pursuant to a statutory scheme that mandated a uniform price for products. 7 U.S.C. § 608c (5)(c). In contrast, the dispute at issue is between private interests and their related private contracts. While the refunds are mandated by FERC, the internal accounting system implemented by TCo to manage monies is not. *See also In re Commodity Exchange Services Co.,* 62 B.R. 868 (N.D.Tex.), *aff'd* 67 B.R. 313 (N.D. Tex. 1986) (criticizes *United Milk*).

Likewise in *Joliet-Will,* 847 F.2d 430 (7th Cir. 1988), the government's stake in federal grant monies was significant. Debtor Joliet-Will was a "private nonprofit community service organization financed exclusively by federal and state grants." *Id.* at 431. Because all monies were either federal grant money or personal items bought by funding, federal agencies argued the assets belonged to them and should not be available to the creditors. The court agreed, reasoning that: 1) federal grants were

extremely particular with little discretion afforded the recipient; 2) the recipient was similar to an agent, charged with particular tasks, unlike a borrower or "entrepreneur using investment funds"; 3) "Congress is traditionally chary about giving agencies broad discretion with regard to expenditures or authorizing such agencies to delegate discretionary authority to private groups"; 4) precedent reflects federal funds held by a grantee generally remain federal property, until expended according to terms; and 5) "the treatment of such grants in other areas of law, notably criminal law, [indicate that] thefts of federal grant money (or personal property bought with such money) are treated as thefts from federal government, though for reasons of policy not obviously present here, primarily the lack of incentive of states to prosecute crimes in which the only victim is the federal government." *Id.* at 433.

The *Joliet-Will* considerations are not present at bar. First, the contracts do not contain specific language as to how refunds should be managed or used. Second, unlike an agent, TCo used the monies for its own purposes. Third, there are no comparable criminal penalties implicated by refusing to allow the refunds to pass to the customers. Finally, while the government in *Joliet-Will* had a direct interest in its funds, it lacks a similar interest in the customer refunds at bar.

In *Yonkers,* the court imposed a constructive trust where the governing bodies, the state and local school board, also had a direct interest in monies held by the debtor for students' education. 58 B.R. at 980, 982. The *Yonkers* monies originated from the state as part of a complicated payment and reimbursement scheme established for the education of the state's children. In imposing the trust, the court concluded the statutory scheme intended the monies, which had been commingled, for the sole benefit of the children, rather than the financial benefit of the debtor. We do not find *Yonkers* sufficiently compelling to impose a constructive trust. As noted, the

government lacks the intimate interest in the refunds at bar that was found in *Yonkers*. Furthermore, there is no similar paramount state interest herein.

Setting aside the conduit theory, a constructive trust is unwarranted as the record does not reflect wrongful conduct, mutual mistake or that unjust enrichment will result. Also, in view of the commingled funds, the res requirement for a constructive trust is absent. *In re Leedy Mortgage,* 111 B.R. 488, 494 (Bankr. E.D. Pa. 1990); *see, e.g., First Federal of Michigan v. Barrow,* 878 F.2d 912, 915-16 (6th Cir. 1989).

Having found no trust relationship, we find it is unnecessary to review the Bankruptcy Court's decision as to the amount to be disbursed consistent with its interpretation of the lowest intermedia balance test.

ISSUE TWO: UPSTREAM PIPELINE CHARGES

The Bankruptcy Court's findings of fact are not clearly erroneous as to this issue and reflect:

> TCo is itself a customer vis-a-vis its upstream gas suppliers. The rates it pays include upstream costs relating to transportation, the PGA, and Order No. 500 charges. Since April 1, 1991, TCo's costs relating to upstream pipeline transportation charges have been itemized separately in its tariff, in the Transporation Cost Recovery Adjustment ("TCRA") provision. TCo's TCRA costs are recovered on a dollar-for-dollar basis from its customers, and are also subject to refund. TCRA charges are separately accounted for in its gas rates through a tracking mechanism. As a result of the rate making process, TCo incorporates into the rates it charges its customers these three types of upstream charges.

136 B.R. at 940. TCo sought to pay prepetition charges billed by its upstream pipeline suppliers and transporters. The charges were fully recoverable by TCo from its cus-

tomers. *Id.* The Bankruptcy Court found that TCo "anticipates recovering these charges from its customers *after* making the upstream payments" and the upstream charges sought to be paid total about $16 mililon. *Id.* Although utilizing the same analysis applied to customer refunds based on federal common law, the Bankruptcy Court rejected the existence of a trust relationship after concluding that the payments were for goods and services TCo has received. Particularly important is the Bankruptcy Court's determination that the monies to be used to "pay upstream suppliers have *not* been collected from downstream customers." Instead "TCo proposes to recover these monies from its customers *in the future*" and, therefore, "the monies for upstream payments cannot be traced from any particular source." 136 B.R. at 930, 940 (emphasis in original).

Ozark Gas Transmission System maintains the Bankruptcy Court incorrectly differentiated between the trust funds related to downstream customers and those payments related to the upstream pipeline transporters. Ozark asserts the relationship between TCo and upstream suppliers is analogous to TCo's situation with its customers. According to Ozark, the Bankruptcy Court should have focused on the intent of TCo and the upstream pipeline transporters, the accounting system used by TCo, the relationships between the parties and the intricate regulatory scheme. These indicia, Ozark argues, establish a trust relationship under federal common law.

Meridian Oil argues the Bankruptcy Court incorrectly applied federal law to the upstream trust issue. Regardless of whether federal or state trust law principles apply, however, Meridian asserts the elements of a trust were never demonstrated.

For the reasons enumerated in Issue One, state trust law controls. Applying the trust factors to the record, we find no showing of a trust relationship. The absence of an ability to trace the monies which have not even been col-

lected from the downstream customers vitiates the purported trust. *See* 136 B.R. at 940.

ISSUE THREE: 11 U.S.C. §§ 105 & 1108

TCo contends the standard of review is *de novo* with respect to this third issue on appellate review because the Bankruptcy Court rendered ultimate facts that were based on an incorrect application of the law. Since the Third Circuit's pronouncement on ultimate facts, i.e., a mixture of fact and legal precedent, *Meridian v. Alten,* 958 F.2d at 1226, 1229 is in accord, to turn to the precise language of the Bankruptcy Court's decision:

> In connection with the customer refund aspect of its motion, TCo alleges that "failure by TCo to provide these refunds *could* severely jeopardize its relationships both with its customers and the FERC." These allegations were never proven. Indeed, in its post-hearing proposed findings of facts, TCo did not even suggest that these allegations had been proven. Moreover, these allegations are insufficient as a matter of law.
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> * * * *
>
> [With regard to upstream payments TCo asserted:] The tariffs of these upstream pipelines all have provisions which allow [upstream pipeline sellers and transporters] to suspend or abandon service or terminate the contracts, under certain conditions, for non-payment of bills. The gas supply and transportation services of these pipelines are often necessary for TCo to meet its certified service obligations to its customers. . . . If such services were interrupted or abandoned, TCo would not be able to meet the requirements of its customers during peak winter periods, and, at minimum, would lose goodwill with its customers. . . . If these services are suspended, TCo may not be able to meet its purchase obligations to producers. TCo failed to prove these allegations.

136 B.R. at 940-941. Although the Bankruptcy Court's use of the phrase "insufficient as a matter of law" suggests legal and factual conclusions were intertwined, the court's specific finding of a record devoid of evidence to support the harm which TCo had prophesied is factual and independent of the ultimate facts described; therefore, the clearly erroneous standard applies. Because the Court finds the facts are not clearly erroneous, we turn to a plenary review of the law.

TCo argues the Bankruptcy Court's rejection of relief under 11 U.S.C. §§ 105,[12] and 1108 was erroneous because *Lehigh* was not the correct law to apply (C.A. No. 92-127-SLR D.I. 37); therefore, the case should be remanded for new findings of fact and application of the correct law. According to TCo, employing *Lehigh* for the necessity of payment test was incorrect as § 105 grants courts broad equitable powers to compel relief that is necessary and appropriate. *Voest-Alpine Trading USA v. Vantage Steel Corp.*, 919 F.2d 206, 215 (3d Cir. 1990). TCo also argues the goal of Chapter 11 is rehabilitation of the debtor and the court can accommodate this, largely without limitation, as long as the action pursued is consistent with the Chapter. *In re Adams*, 115 B.R. 59, 63 (Bank. D.N.J. 1990).

Alternatively, even under *Lehigh*, TCo argues it proved that the refusal to authorize the flowthrough and upstream charges would allow TCo to charge rates that are not just and reasonable and, therefore, in violation of FERC orders and the FERC tariff. This violation alone is sufficient proof of detrimental events that may only be avoided through utilization of § 105 powers. Al-

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[12] The provision of 11 U.S.C. § 105 implicated provides in part: "(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this Title." 11 U.S.C. § 1108 states: "Unless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business."

though TCo has invoked application of both sections, only § 105 grants the authority to compel the relief sought. According to the Third Circuit,

> Section 105(a) authorizes the bankruptcy court, or the district court sitting in bankruptcy, to fashion such orders as are required to further the substantive provisions of the Code. Section 105(a) gives the court general equitable powers, but only insofar as those powers are applied in a manner consistent with the Code. Nor does section 105(a) give the court the power to create substantive rights that would otherwise be unavailable under the Code.

In re Morristown & Erie R. Co., 885 F.2d 98, 100 (3d Cir. 1989) (citations omitted); *accord Southern Ry. Co. v. Johnson Bronze Co.*, 758 F.2d 137 (3d Cir. 1985).

In view of our conclusions outlined above, the relief sought is inappropriate under the Code. Accordingly, we need not reach whether application of *Lehigh* was correct.

CONCLUSION

For the reasons outlined above, the Bankruptcy Court's order of February 13, 1992 is reversed in part and affirmed in part.

An Order consistent with this Memorandum Opinion shall issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Chapter 11
Case Nos. 91-803–91-804

IN RE: THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Debtors.

Civil Action No. 92-127-SLR

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-235-SLR

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellants,

v.

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION,
Appellee.

Civil Action No. 92-236-SLR

OFFICIAL COMMITTEE OF CUSTOMERS,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-237-SLR

ENERGY DEVELOPMENT CORPORATION,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-238-SLR

WEST OHIO GAS COMPANY,
THE PEOPLES NATURAL GAS COMPANY and
VIRGINIA NATURAL GAS, INC., NATURAL GAS, INC.,
Appellants,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-239-SLR

MERIDIAN OIL PRODUCTION, INC.,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-240-SLR

OZARK GAS TRANSMISSION SYSTEM and
OZARK FINANCE CORPORATION,
Appellants,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-241-SLR

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-242-SLR

MARYLAND OFFICE OF PEOPLE'S COUNCIL,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-243-SLR

PUBLIC UTILITIES COMMISSION OF OHIO,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

ORDER

At Wilmington this 6th day of August, 1992;

IT IS ORDERED that the Opinion in the above cases, filed on July 6, 1992, be amended as follows:

1. Page 3, first line delete "not".

2. Page 3, first full paragraph, line 9 change "to" to "by".

3. Page 33, line 17 last line of the carryover paragraph, change "unpersuasive" to "persuasive".

4. Caption of C.A. No. 92-127-SLR is amended to include Columbia Gas Distribution Companies as an Appellee represented by John J. Dilenschneider, Esquire of Squire, Sanders & Dempsey, Columbus Ohio and Stephen

W. Spence of Phillips, Goldman & Spence, P.A., Wilmington, Delaware.

5. Caption of C.A. No. 92-237-SLR is amended to include Daniel F. Lindley, Esquire of Duane, Morris & Hecksher, Wilmington, Delaware and H. Rey Stroube, III, Esquire of Akin, Gump, Hauer & Feld, L.L.P., Houston, Texas as counsel for Energy Development Corporation.

/s/ Sue L. Robinson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Chapter 11
Case Nos. 91-803–91-804

IN RE: THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Debtors.

Civil Action No. 92-127-SLR

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-235-SLR

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellants,

v.

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION,
Appellee.

Civil Action No. 92-236-SLR

OFFICIAL COMMITTEE OF CUSTOMERS,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-237-SLR

ENERGY DEVELOPMENT CORPORATION,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-238-SLR

WEST OHIO GAS COMPANY,
THE PEOPLES NATURAL GAS COMPANY and
VIRGINIA NATURAL GAS, INC., NATURAL GAS, INC.,
Appellants,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-239-SLR

MERIDIAN OIL PRODUCTION INC.,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-240-SLR

OZARK GAS TRANSMISSION SYSTEM and
OZARK FINANCE CORPORATION,
Appellants,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-241-SLR

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-242-SLR

MARYLAND OFFICE OF PEOPLE'S COUNCIL,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-243-SLR

PUBLIC UTILITIES COMMISSION OF OHIO,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

ORDER

At Wilmington this 6th day of July, 1992, consistent with the Memorandum Opinion issued this same date;

IT IS ORDERED that the Bankruptcy Court's order of February 13, 1992 is reversed in part and affirmed in part.

/s/ Sue L. Robinson
United States District Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
D. DELAWARE

IN THE MATTER OF THE COLUMBIA GAS SYSTEM, INC., and COLUMBIA GAS TRANSMISSION CORPORATION,
Debtors.

Bankruptcy Nos. 91-803, 91-804

Feb. 13, 1992

MEMORANDUM OPINION AND ORDER

HELEN S. BALICK, Bankruptcy Judge.

On August 23, 1991 the Columbia Gas Transmission Company (ToC), a debtor-in-possession, moved this court for an omnibus order authorizing it to comply with its Federal Energy Regulatory Commission Gas Tariff and orders and regulations of the Federal Energy Regulatory Commission. Three related aspects dealt with payment of FERC-ordered refunds to TCo's customers, payment of surcharges to the Gas Research Institute, and payment of charges to upstream natural gas suppliers and transporters. In the context of TCo's Chapter 11 proceedings, these three aspects have become commonly known as the "FERC motion." An evidentiary hearing on the FERC motion was held on October 17, October 22, and November 27, 1991. The FERC motion was supported and opposed by many parties, and the Court has been flooded with briefing. The Court appreciates the efforts of the parties to coordi-

nate their posthearing briefing so as not to repeat argument.

The central dispute concerns whether certain monies TCo controls are property of the estate, and whether TCo may, consistent with the Bankruptcy Code, pay certain unsecured pre-petition obligations in advance of a confirmed plan of reorganization. This is the Court's opinion on this core proceeding. 28 U.S.C. § 157(b)(2)(A); § 157(b)(2)(M).

I. *Customer Refund and GRI Facts* [1]

TCo is an interstate transporter and seller of natural gas. It purchases gas from upstream pipeline suppliers and gas producers. TCo also transports gas from upstream suppliers to customers of the suppliers.

TCo sells gas to either local distribution companies or other transporters (customers). About 50% of its customers are affiliated with TCo or Columbia Gas Systems, Inc. None of these affiliates are in a Chapter 11 proceeding.

For each business relationship, TCo has executed a contract, relating to either the purchase, storage, transportation or sale of gas. Contract quantities are in units of decatherms (a measure of the amount of gas needed to produce a certain amount of heat). The rate TCo charges to each customer generally differs. TCo sells or transports about one billion decatherms of gas per year.

A. The Federal Regulatory Scheme

TCo's interstate gas operations are subject to the Natural Gas Act, 15 U.S.C. § 717 (1984). The NGA grants various powers to FERC, including the ability to set rates

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[1] While some of the discussion herein is more legal than factual in nature, it provides necessary background for the motion and is more appropriately placed here.

and charges. 15 U.S.C. § 717c (1984). Subsection 717c(a) establishes a framework for FERC rate-making authority: "All rates and charges made, demanded, or received by any natural-gas company . . . shall be just and reasonable, and any rate or charge that is not just and reasonable is . . . unlawful."

FERC's general ratemaking procedure is set out in 18 C.F.R. Part 154 (1991). If FERC determines that a rate TCo is charging a customer is too low, FERC cannot retroactively increase the rate that TCo charges a customer. § 717d; *Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981). Instead, FERC adjusts for the discrepancy on a dollar-for-dollar basis in prospectively setting TCo's rates. If FERC determines that a rate TCo is charging a customer is too high, FERC can order payment of refunds as well as adjust rates prospectively. A computation of the rates TCo charges its various customers along with copies of its service agreements comprises TCo's "tariff," a multi-volume book. The gas suppliers are also subject to FERC's rate-making authority and thus the rates *they* charge are subject to periodic review and modification. TCo's contracts with its downstream customers usually incorporate the applicable terms and conditions from its tariff.

TCO's gas rate for each customer consists of two components: the purchased gas adjustment (PGA) component and the general rate component. The PGA component reflects the cost of gas (price per decatherm times decatherms sold) TCo purchases from each supplier. TCo cannot predict its PGA costs. In order to track actual versus estimated PGA costs, FERC requires TCo to file estimated purchase costs every three months. The PGA filings are reconciled annually with TCo's actual purchase costs, and FERC adjusts TCo's PGA rates accordingly. TCo is not usually allowed to profit from the purchased gas component of its rates. While not required by the

NGA, the PGA method of tracking certain costs has been used extensively in the gas industry since 1972. *See generally* 18 C.F.R. §§ 154.301-310 (1991). The industry recognizes that this method allows TCo to "pass through" its PGA costs to its customers.

The general rate consists of TCo's internal non-gas costs, other charges, and a FERC-authorized rate of return (about 13% in the Fall of 1991) based upon the Federal Reserve prime rate. When TCo seeks to increase its general rate, it must file with FERC the proposed increase, with all accompanying data. Within 30 days, FERC must issue an order preliminarily allowing the new rate to go into effect, or suspending the effective date of the new rate filing up to five months.

If FERC allows the new filing to go into effect, it is "subject to refund." Subsequently, FERC conducts a due process hearing, reviews the filing, reconciles it with TCo's actual non-purchase costs, and determines whether TCo has under-recovered or over-recovered its costs for a given period of time. If FERC should subsequently determine that a rate contained in the filing is unjust, it can order TCo to refund the over-recovered amount as well as prospectively reduce the unjust rate. § 717c(e); § 717d; 18 C.F.R. Part 2 (1990). Refunds include interest from the date of collection at a rate based on the prime rate. 18 C.F.R. § 154.67(c)(2)(iii) (1991) (rolling average formula). This rate was 8.5% on October 22, 1991. Tariffs address the manner and timing of refunds.

B. The FERC-Ordered Customer Refunds

In the mid-1980's, an industry-wide problem occurred when a significant drop in the price of nautral gas caused a substantial number of contracts with above market prices between producers and pipelines to be uneconomical. FERC attempted to alleviate the financial detriment by allowing pipelines to buydown and buyout their contracts

with producers. In a buydown, a pipeline pays a producer money to reform the contract. In a buyout, the pipeline pays a producer to allow the pipeline to terminate the contract. In 1987, FERC promulgated Order No. 500. This order allowed pipelines upstream of TCo to recover, subject to refund, a portion of the cost associated with the buyouts and buydowns by passing through this portion to their downstream customers. Since 1987, pipelines have been passing through Order No. 500 costs to TCo, which in turn has been passing these costs to its customers.

The promulgation of Order No. 500 resulted in extensive litigation relating to its legality, and eventually FERC promulgated a subsequent order (No. 528) intended to correct defects found to exist in Order No. 500. A complete history of the litigation of FERC Order No. 500 is contained in *Associated Gas Distributors v. FERC,* 893 F.2d 349, *reh'g denied,* 898 F.2d 809 (D.C.Cir.1990), *cert. denied,* —— U.S. ——, 111 S.Ct. 277, 278, 112 L.Ed.2d 232, 233 (1990).

Order No. 528 contemplates that TCo's upstream pipelines will be allowed to pass through a much smaller portion of their buyout and buydown costs than allowed under Order No. 500. Thus Order No. 528 anticipates that TCo, and hence its customers, will receive thousands of distinct refunds. The refunds differ by sources of the overcharge, time period of the overcharge, and customer entitled to the refund. The proceedings determining the exact amount of the refunds are ongoing. No one disputes, however, that TCo, and hence its customers, will be entitled to Order No. 528 refunds totally approximately $134 million.

There are other FERC-ordered refunds that TCo wishes to honor. These refunds total about $26.5 million, for a grand total of $160 million that TCo seeks permission by its FERC motion to pass through to its customers. As of the date of its Chapter 11 filing, TCo had received but not

passed through about $21 million in FERC-ordered refunds. Post-petition, TCo expects to receive approximately an additional $140 million in refunds. TCo must pay interest to the customers on the refunds it has received at a FERC-prescribed rate. 15 U.S.C. § 717c(e); 18 C.F.R. § 154.67(c) (1991).

C. The Nature and Categories of the Refunds within the Context of these Proceedings

While it is not disputed that all the FERC-ordered refunds discussed here relate to pre-petition overcharges, the court observes that for the purposes of the FERC motion, the refunds divide into two analytical categories. First, there are those refunds for which a final FERC order exists and which TCo received pre-petition (the $21 million figure). Second, there are those refunds that TCo has received or will receive post-petition. The need for these two categories will become apparent in sections II.D-E.

D. TCo's Cash Management and Accounting Systems

TCo's financial accounting process is based on the Uniform System of Accounts promulgated by FERC at 18 C.F.R. § 201 Subchapter F. Accounting entries are made on a monthly basis. When TCo receives a refund, it treats the refund as an increase to its assets. TCo simultaneously creates a corresponding liability on its books reflecting its obligation to the corresponding customer. As long as the refund is passed through within eight and a half months of the year in which the refund was received, TCo need not pay income tax on the refund asset.

TCo tracks the various refunds it passes through using "accounting accounts." These accounts are not actual money accounts, but are mathematical and informational mechanisms for complying with the difficult task of sorting out its refund obligations. The accounting accounts thus segregate refunds by:

1. Source of refund;
2. Legal reason for the refund;
3. Time period in which the refund relates; and
4. Designated downstream recipient of the refund.

TCo maintains on the order of 100 accounting accounts.

TCo, however, does not maintain separate bank accounts for the different categories of refunds. It uses a combined cash management system. This system receives cash from many different sources, and uses the cash without restriction. The pooling of funds allows efficient utilization of cash resources and recognizes the impracticalities of maintaining separate cash accounts for the many different purposes that require cash.

TCo receives refunds from upstream suppliers and transporters of gas in the form of checks, wire transfers, and billing credits. TCo normally passes through refunds in the same manner. If the FERC motion is granted, TCo will pay a portion of the refunds out of cash funds, and a portion through "billing credits" imposed upon future billings to the customers for future gas sales.

Prior to the filing of its Chapter 11 petition, TCo's normal business practice was to minimize its cash balance. Every day the excess of deposits over disbursements was computed and either invested or used to pay down short-term debt with its parent, Columbia Gas Systems, Inc. On the day TCo filed its Chapter 11 petition, it had $3.3 million in cash.

E. Gas Research Institute Surcharges

The Gas Research Institute is a not-for-profit, tax-exempt research and scientific organization which funds research activities related to the natural gas industry. GRI does not provide any direct services to TCo. GRI derives a portion of its funding through surcharges that FERC

imposes upon the sale and transportation gas. FERC regulations and orders require TCo to collect these surcharges from its customers, and then to pay these amounts to GRI within 15 days. The surcharge, 1.42 cents per decatherm, is identified in TCo's tariffs, and TCo maintains separate accounting records for the received surcharges.

II. *Discussion of the Refund and GRI Surcharge Payment Motions*

TCo seeks authority to: "flow through to its customers refunds received by Transmission from its upstream pipeline suppliers relating to pre-petition overcharges in accordance with FERC orders and regulations and settlements approved by FERC." FERC motion, at 6. This motion refers to the $160 million TCo wishes to refund to downstream customers. Because of the inchoate status of the second category of refunds, TCo does not seek to pay out all $160 million at this time, but seeks permission to pay out all category one refunds, and the refunds in the second category it has received. With respect to the refunds in the second category that TCo receives in the future, TCo seeks in substance a declaratory judgment that these refunds may be paid out without further application to this Court.

Equality of distribution among claimants is a central policy of the Bankruptcy Code. Similarly situated claimants should receive pro rata shares of the debtor's property, and only in the context of a confirmed plan. *E.g., Goldberg v. New Jersey Lawyers' Fund,* 932 F.2d 273, 280 (3d Cir.1991). In light of these overriding principles, TCo offers two grounds to justify the customer refund and GRI surcharge payments.

The first ground is that the pre-petition amounts are not part of the estate, and that therefore, it does not need court authorization to disburse these monies. Property of the estate includes "all legal or equitable interests of the

debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). TCo controls the funds at issue and does not dispute that section 541(a)(1) applies to the funds it seeks to pay out.[3] Instead, it argues it holds the funds in trust for the customers and therefore has legal title, but no equitable interest in the funds. If so, then:

> Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . , becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not the extent of any equitable interest in such property that the debtor does not hold.

§ 541(d). TCo concludes, and the objectors do not dispute, that if TCo holds the funds in trust, the funds are not property of the estate and TCo may, consistent with the Bankruptcy Code, make the requested payments. *See, e.g., Begier v. IRS,* 496 U.S. 53, ——, 110 S.Ct. 2258, 2263, 110 L.Ed.2d 46 (1990).

In determining the nature and extent of TCo's property interest in the funds, the first issue is to what body of law the court should look. TCo has not been helpful on this choice of law issue. During two stages of briefing on the issue, it waffled between whether state or federal common law applies. The Official Committee of Unsecured Creditors of TCo, which opposes the customer refund payments, argues that state law applies.

A. Whether the Monies TCo Proposes to use for Customer Refunds and GRI Payments are Property of TCo's Estate is a Question of Federal Law.

While generally state law determines property interests, *e.g., Jaffke v. Dunham,* 352 U.S. 280, 281, 77 S.Ct. 307,

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[2] At one stage of the briefing of the FERC motion, TCo changed its position and suggested that perhaps it did not have even legal title to the funds. That position is without merit.

308-09, 1 L.Ed.2d 314 (1957) (per curiam), in specialized matters of essentially a federal character, federal common law applies. *United States v. Standard Oil Co.*, 332 U.S. 301, 307, 67 S.Ct. 1604, 1608, 91 L.Ed. 2067 (1974) (restricting *Erie* doctrine). *Matter of Lehigh and N.E. Ry. Co.*, 657 F.2d 570 (3d Cir.1981) has explored this doctrine in the context of the interstate railway system.

Lehigh dealt with a railroad in equity receivership that all parties treated as a reorganization/liquidation. *Id.* at 575. The railroad had ceased operations over two and one-half years prior to the receivership filing. *Id.* at 572 & n. 3. The District Court, sitting in diversity, held that interline claimants had a first priority in mortgaged assets to pay pre-receivership interline claims and thus had priority over the mortgage bondholder's secured claims in the assets.

On appeal the Court of Appeals explicitly addressed the same choice of law issue. Citing four factors, it declared that federal, not state law would apply. First, the funds in question arose out of railroad operations in interstate commerce. Second, Congress enacted the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.* and the Regional Rail Reorganization Act, 45 U.S.C. § 701 *et seq.*, thus manifesting its intent to establish a national transportation policy. Third, Congress established the Interstate Commerce Commission to regulate interstate commerce by rail. Finally, the *Lehigh* court observed that uniformity in the balancing of interline freight accounts was required to allow the nation's railway system to operate properly as a single system. *Id.* at 575. Based upon these four factors, the *Lehigh* court concluded that the issue of the interline payments "implicate wholly national concerns and should be governed by federal law. *Id.* at 576.

These *Lehigh* factors dictate that federal common law should be used to analyze TCo's property interest in the funds it seeks to pay out. The funds in question arose

from TCo's interstate pipeline operations. Congress has enacted the Natural Gas Act to manifest its intent to establish a national policy concerning the transportation and sale of natural gas. Through the NGA, Congress established the Federal Energy Regulatory Commission to regulate these matters.

Finally, uniformity in the regulation of gas rates is important to the proper operation of the natural gas industry. Since the filing of its Chapter 11 petition, TCo has been unable to pay pre-petition customer refunds and GRI surcharges. The status of the refunds and GRI surcharges, as discussed in Section I.B. & E, *supra*, depends solely upon federal law relating to the NGA. Application of a particular state's law to resolve these payment issues would not further Congress' intent to promote a national scheme of "just and reasonable rate[s]". 15 U.S.C. § 717d (a). In short, the considerations that led the *Lehigh* court to apply federal common law of trusts apply with equal force here.

Contrary to the position of The Official Committee of Unsecured Creditors of TCo, *Federal Power Comm'n v. Interstate Gas Co.*, 336 U.S. 577, 69 S.Ct. 775, 93 L.Ed. 895 (1949) supports, and does not undermine this conclusion. In that case the Federal Power Commission (the predecessor of FERC) reduced the rates of an upstream pipeline which created a refund scenario. At issue was what body of law a federal court should apply in determining the competing rights of downstream pipelines and customers of those pipelines to the refunds. The United States Supreme Court did say that if local law provides a standard for determining competing refund rights, it should be applied. *Id.* at 583, 69 S.Ct. at 779. However, that was not the case there, nor is it the case here. Moreover, the Supreme Court observed that federal law determines the refund rights of downstream distribution companies that are subject to the Commission's jurisdiction. *Id.* at 580-81, 583, 69 S.Ct. at 778-79.

B. Refund Monies TCo Receives are Held in Trust.

The federal common law of whether a trust relationship exists is explained in *In re Penn Central Transportation Co.*, 486 F.2d 519 (3d Cir.1973), *cert. denied*, 415 U.S. 990, 94 S.Ct. 1588, 39 L.Ed.2d 826 (1974). *Penn Central* involved a railway reorganizing under section 77 of the Bankruptcy Act. The national railway system at that time consisted of numerous railways that provided transportation for goods from the point of origin to destination. A shipper's railroad car traveled over the lines of many different railroads, and was used by each of them before it returned to the possession of the owning railroad. The railroads created a system of accounting and periodic settlement of accounts to facilitate this manner of operation. The accounting for various rail services rendered to the public and other railroads resulted in "interline accounts," and the settlement of accounts resulted in "interline balances." 486 F.2d at 521.

An interline carrier moved for an order requiring the railway to pay pre-petition interline accounts and balances. The *Penn Central* court considered the nature of the interline accounting system in ruling whether payment of such pre-petition amounts would be allowed. It observed that the interline accounting system was essentially a system:

> [B]y which one railroad collects monies owed by shippers to both itself and other railroads. The monies collected belong only in part to the collecting railroad; as to monies owed other railroads, the collecting railroad serves merely as a receiving and transmitting agent.

Id. at 523-24.

The court saw the key question as whether the funds were intended to be held in trust, without reference to state law. Two factors relating to this were whether the collecting agent paid interest on monies held, and whether

the monies were commingled with the general funds. In the *Penn Central* case, the absence of interest suggested a trust, while the existence of commingling suggested a debtor-creditor relationship. *Id.* at 524. The court observed that commingling has minimal significance in the extraordinary operations of interline railroads because normal operations preclude as a practical and economic matter any effective daily segregation. *Id.* at 525. It concluded, that as to freight and passenger accounts, the funds were held in trust. *Id.* at 525-527.

A second group of interline accounts at issue in *Penn Central* related to train car repair, per diem rental, and switching charge accounts. The court reasoned that these "accounts do not involve collection of money by one carrier for another. These accounts merely represent the performance of services by one railroad." *Id.* at 528. The court concluded the amounts due on these accounts were not held in trust.

The last type of interline account analyzed was the overcharge and loss and damage (overcharge) account. When a shipper discovered that the railroads overcharged him, or that he was due payments for loss of, or damage to goods shipped, he made a claim to any carrier which participated in the shipment. The carrier which paid the claim could then draw upon a draft on the responsible carrier within the same month. *Id.* at 527-28.

The *Penn Central* court found the overcharge account the most difficult to analyze conceptually. While recognizing that this account possessed some indicia of a trust fund, *Id.* at 528-29, it held that the overcharge account was not held in trust for the following reasons. First, the Interlines had argued that the overcharge amounts must be paid immediately to comply with specific statutory requirements. The court found no such requirements to exist. Instead, the payment scheme resulted from a voluntary set of rules the Association of American Railroads promulgated. Second, when the debtor railway received

the freight payment, "it had *no notice that at a later date part of those sums would have to be returned.*" *Id.* at 528-29 (emphasis added).

TCo has satisfied the *Penn Central* standards for proving the refunds are held in trust when received. Commingling of the actual funds, as in *Penn Central,* has minimal significance here due to the nature of TCo's business and the impracticalities and administrative burdens of maintaining actual separate accounts for each type of refund. In contrast with the car repair, rental and switching accounts in *Penn Central,* the refunds do not equate with the unpaid performance of goods or services. The refund procedure *does* involve the collection of money by one entity for another.

Finally, the refunds starkly contrast with the overcharge accounts at issue in *Penn Central.* Here, the payment procedures are not voluntary, but are mandated by federal law. More importantly, because all rates are approved "subject to refund," TCo *is* on notice that at a later date, a portion of the monies it receives may have to be disgorged.

C. GRI Monies TCo Received were Held in Trust.

TCo seeks authority to: "pay pre-Petition charges to FERC and the Gas Research Institute, which charges are fully recoverable by Transmission from its customers under separately identifiable surcharges in its Tariff." FERC motion, at 5. At issue here is approximately $1.8 million TCo has collected from its sales and transportation customers for the months June and July 1991. All monies collected before this time were paid to GRI prior to TCo's Chapter 11 filing. All monies collected post-petition TCo has paid or will pay on a month to month basis. 11 U.S.C. § 365(d)(3).

After considering the same factors discussed in connection with the refunds, the court finds TCo has satisfied its burden that GRI surcharges when received are

held in trust. These surcharges involve the collection of money by TCo from its customers for a third party. The customers are not paying TCo for goods or services. Finally, the GRI surcharge is separately identified in TCo's tariff.

D. TCo's Ability to Pay Surcharges to the GRI and Category One Refunds to its Customers is Limited by the Lowest Intermediate Balance Rule.

Application of *Penn Central,* however, does not end the analysis of the FERC motion. In *Penn Central,* there were always sufficient general funds to pay the trust claims and therefore that court's finding of a trust fund was sufficient to allow the freight and passenger interline payments. Here, however, as will be discussed, sufficient funds to pay the trust claims do *not* always exist. Therefore, the court's finding of a trust relationship between TCo and its customers and the GRI is *not* sufficient to allow the refund and GRI payments. The *Lehigh* case conveniently provides the additional federal common law of trusts necessary to resolve the issues the FERC motion raises.

In *Lehigh,* the mortgage bondholder (Central Jersey Industries) had objected to the proposed payment of the interline claims and had proved that there had been a complete dissipation of funds with which the trust funds were commingled. Therefore, the *Lehigh* court found that the "dissipation of trust" rule applied:

> "The basic idea of the trust doctrine as applied in bankruptcy is a fair and reasonable identification of the property or fund so as not to harm other creditors. . . . [T]he claimant must assume the burden of ascertaining and tracing the trust property. . . .'

Id. at 579 (quoting *Sonnenschein v. Reliance Ins. Co.,* 353 F.2d 935, 936-37 (2d Cir.1965)).[3] The court also

[3] TCo's suggestion that this Court's decision in *In re Delaware & Hudson Ry. Co.,* 127 B.R. 756 (Bankr.D.Del.1991) released this tracing requirement is without merit.

found that this rationale applied to secured as well as unsecured creditors. Since the *res* of the mortgaged assets could neither be identified with nor traced to interline payments, the *res* was not held in trust.

The dissipation of trust rule accords with federal common law in other Circuits and as originally established by the United States Supreme Court. As the First Circuit Court of Appeals recently stated:

> The normal rule for construing trust proceeds commingled in a bank account is known as the 'lowest intermediate balance test.' Under that test, set down by the Supreme Court in *Schuyler v. Littlefield,* 232 U.S. 707 [34 S.Ct. 466, 58 L.Ed. 806] (1914), and *Cunningham v. Brown,* 265 U.S. 1 [44 S.Ct. 424, 68 L.Ed. 873] (1924), a court will [allow trust proceeds to be paid] where the amount on deposit has at all times since the commingling of the funds equaled or exceeded the amount of the trust fund. Where, however, after the commingling, all the money is withdrawn, the trust fund is treated as lost, even though later deposits are made into the account. Should the amount on deposit be reduced below the amount of the trust fund but not depleted, the claimant is entitled to the *lowest intermediate balances* in the account.

Conn. Gen. Life Ins. v. Universal Ins. Co., 838 F.2d 612, 619 (1st Cir.1988) (other citations omitted) (emphasis added). *See generally* 4 *Collier on Bankruptcy* ¶ 541.13, at 541-79 (1991); V A.W. Scott & W.F. Fratcher, The Law of Trusts, § 518, at 634-636 (4th ed. 1989).

TCo has more than met its burden of fairly and reasonably identifying the refund obligations it wishes to honor. TCo initially identifies the refund obligation when it receives a FERC-ordered payment from upstream. TCo continues to fairly and reasonably track each obligation as it arises through TCo's 100 accounting accounts,

which provide detailed information available about each refund. TCo will employ the same practices for refunds it receives in the future.

In reference to the motion to pay GRI surcharges and the first category of customer refunds, however, TCo has only partially satisfied its burden of tracing the property it seeks to use to make the payments. TCo has identified monies as trust funds only to the extent of its lowest intermediate cash balance. On July 31, 1991, the date it filed its Chapter 11 petition, TCo had only $3.3 million in cash. This figure presents the lowest intermediate balance, and reduces TCo's ability to pay refunds received as of that date (which totalled about $21 million) and GRI surcharges (about $1.8 million) to that amount. Therefore, TCo may pay these obligations only on a *pro rata* basis in an amount not exceeding $3.3 million.

E. TCo May Pay Category Two Refunds.

As for the second category of refunds, the objectors neither argued nor presented evidence, as Central Jersey did in *Lehigh,* that the lowest intermediate balance rule operates to deny any or all of the relief TCo requests. That is, no evidence exists that post-petition, TCo's refund obligations were or will be less than its cash balance. Quite the contrary, TCo proved it received $100 million in September, had $172 million in liquid funds at the end of September, and that its cash balance has only increased since then. TCo also presented explicit evidence that its cash balance is sufficient to pay its present and future refund obligations. This record is sufficient to prove that post-petition, there is no reason to limit TCo's ability to pay refunds.

F. The "Necessity of Payment" Doctrine is Not Applicable.

1. *Customer Refunds*

Because sections II.D-E. grant the refund and GRI aspects of TCo's FERC motion only in part, it is necessary to address TCo's second ground for its FERC motion. This ground relies upon sections 105 and 1108 of Title 11. Section 105(a) in relevant part states: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Section 1108 states: "Unless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business." In this Chapter 11 proceeding, no trustee has been appointed, and TCo is in possession of its own business. Reading sections 105(a) and 1108 together then, TCo's contention is that the payments are necessary or appropriate for TCo to operate its business and to aid its reorganization. This begs the question of the appropriate standard for allowing payment of a pre-petition obligation where the monies for the payment are property of the estate.

T*he Lehigh* court was faced with the same question in the context of whether interline creditors could be paid out of the corpus of mortgaged property. 657 F.2d 570, 581. The court reiterated the "necessity of payment" doctrine that applies in the Third Circuit. If payment of a pre-petition claim "is essential to the continued operation of [debtor], payment may be authorized." *Id.* While the *Lehigh* court further detailed this standard, it is not necessary to do so here.

In connection with the customer refund aspect of its motion, TCo alleges that "failure by TCo to provide these refunds to its customers *could* severely jeopardize its relationships both with its customers and the FERC." FERC motion, at 18 (emphasis added). These allegations

were never proven. Indeed, in its post-hearing proposed findings of facts, TCo did not even suggest that these allegations had been proven. Moreover, these allegations are insufficient as a matter of law.

2. *GRI Surcharges*

While TCo has asserted that the necessity doctrine applied to the GRI aspect of its FERC motion, no evidence was presented that supports this ground.

III. *TCo May Not Pay Upstream Pipeline Charges*

A. Upstream Pipeline Facts

TCo is itself a customer vis-a-vis its upstream gas suppliers. The rates it pays include upstream cost relating to transportation, the PGA, and Order No. 500 charges. Since April 1, 1991, TCo's costs relating to upstream pipeline transportation charges have been itemized separately its its tariff, in the Transportation Cost Recovery Adjustment provision. TCo's TCRA costs are recovered on a dollar-for-dollar basis from its customers, and are also subject to refund. TCRA charges are separately accounted for in its gas rates through a tracking mechanism. As a result of the rate making process, TCo incorporates into the rates it charges its customers these three types of upstream charges.

B. Discussion of the Upstream Payment Motion

TCo's FERC motion seeks authority to:

> [P]ay pre-petition charges billed to Transmission by its upstream pipeline suppliers and transporters (including affiliates) under their FERC Tariffs and Orders for services which are necessary to meet Transmission's delivery obligations, which charges are fully recoverable by Transmission from its customers.

FERC motion, at 5. The last clause of this request refers to the fact that the charges TCo seeks to pay upstream are already fully incorporated into the rates it charges its customers. TCo's motion and briefing admits that TCo anticipates recovering these charges from its customers *after* making the upstream payments. TCo does not seek authority to pay pre-petition charges of the type described in its motion that are not recoverable from its customers. The upstream charges TCo seeks to pay total about $16 million.

TCo asserts the same two legal grounds previously discussed allow it to make the upstream payments.

1. *Monies for Upstream Payments Are Property of the Estate.*

Applying that law as set forth in *Penn Central* and *Lehigh* to the upstream payment motion, the Court finds that the upstream facts are entirely different from those pertaining to the customer refunds and the GRI surcharges. First, the upstream payments *are* for goods and services TCo has received.

More significant is the chronological aspect of the proposed upstream payments. The monies it would use to pay upstream suppliers have *not* been collected from downstream customers. On the contrary, TCo proposes to recover these monies from its customers *in the future*. This proposed payment timeline also means that the monies for upstream payments cannot be traced from any particular source. In short, there is no trust fund here.

2. *The Upstream Payments Are Not Necessary.*

TCo's second ground is that the doctrine of necessity applies to the upstream payments. TCo alleges that:

> The tariffs of these upstream pipelines all have provisions which allow [upstream pipeline sellers and transporters] to suspend or abandon service or to terminate the contracts, under certain conditions, for non-payment of bills. The gas supply and transporta-

> tion services of these pipelines are often necessary for TCo to meet its certificated service obligations to its customers. . . . If such services were interrupted or abandoned, TCo would not be able to meet the requirements of its customers during peak winter periods, and, at a minimum, would lose goodwill with its customers. . . . If these services are suspended, TCo may not be able to meet its purchase obligations to producers.

FERC motion, at 11-12. TCo failed to prove these allegations.

Various other arguments have been raised in support of the FERC motion. The court has considered each, and holds each to be without merit. In particular, to the extent the supporters argue TCo holds monies in a "statutory trust," that notion is rejected. *Begier v. IRS*, 496 U.S. 53, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1991).

IV. *Conclusion*

TCo's motions to pay pre-petition customer refunds and GRI surcharges are GRANTED to the extent stated herein. TCo's motion to pay pre-petition upstream charges is DENIED. An order in accordance with this opinion is attached.

ORDER

AND NOW, February 13, 1992, for the reasons stated in the attached Memorandum Opinion,

IT IS ORDERED THAT:

1. TCo may pay category one refunds and pre-petition GRI surcharges on a pro-rata basis only to the extent of $3.3 million. TCo's motion to pay category one refunds and GRI surcharges is otherwise DENIED.
2. TCo's motion to pay category two refunds is GRANTED.
3. TCo's motion to pay pre-petition upstream pipeline charges is DENIED.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

Case No. 91-803
Case No. 91-804

IN THE MATTER OF THE COLUMBIA GAS SYSTEM, INC.,
and COLUMBIA GAS TRANSMISSION CORPORATION,
Debtors.

ORDER

AND NOW, February 13, 1992, for the reasons stated in the attached Memorandum Opinion,

IT IS ORDERED THAT:

1. TCo may pay category one refunds and pre-petition GRI surcharges on a pro-rata basis only to the extent of $3.3 million. TCo's motion to pay category one refunds and GRI surcharges is otherwise DENIED.

2. TCo's motion to pay category two refunds is GRANTED.

3. TCo's motion to pay pre-petition upstream pipeline charges is DENIED.

/s/ Helen S. Balick
Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-7395, 92-7396, 92-7397, 92-7398, 92-7399
92-7400, 92-7410, 92-7411, 92-7412, 92-7413, 92-7414
92-7415, 92-7435, 92-7436, 92-7499, 92-7500

IN RE: COLUMBIA GAS SYSTEMS INC.,
COLUMBIA GAS TRANSMISSION CORPORATION

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION,
THOMAS E. ROSS,
Trustee

TENNESSEE GAS PIPELINE COMPANY,
Intervenor-defendant

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP ("the Partnership")
AND ITS SUBSIDIARY, OZARK FINANCE CORPORATION
(the "Company"),
Intervenors in support of Appellants

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of
Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of
Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC
SERVICE COMMISSION OF WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

COLUMBIA GAS SYSTEM, INC. ("CG") and
COLUMBIA GAS TRANSMISSION CORPORATION
("TCO" and together with CG, "the Debtors"),
Appellants No. 92-7395

(D.C. Civil No. 92-00127)

IN RE: COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS SYSTEMS INC.

v.

UNSECURED CREDITORS COMMITTEE
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of
Appellants
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA (OPC),
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF CONSUMERS' COUNSEL, STATE OF OHIO (OCC),
Intervenor in support of Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

COLUMBIA GAS SYSTEMS, INC. ("CG") and COLUMBIA GAS TRANSMISSION CORPORATION ("TCO" and together with CG, "the Debtors"),
Appellants No. 92-7396

(D.C. Civil No. 92-00235)

IN RE: COLUMBIA GAS SYSTEMS INC.;
MERIDIAN OIL PRODUCTION INC.

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANS.

THOMAS E. ROSS,
Trustee

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE");
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA (OPC),
Intervenor in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL, STATE OF OHIO (OCC),
Intervenor in support of Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

COLUMBIA GAS SYSTEM, INC. ("CG") and COLUMBIA GAS TRANSMISSION CORPORATION ("TCO" and together with CG, "the Debtors"),
Appellants No. 92-7397

(D.C. Civil No. 92-00239)

IN RE: COLUMBIA GAS SYSTEMS INC.;
PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Intervenor in support of Appellants
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF KENTUCKY,
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/21/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Courts 10/23/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
the MARYLAND PUBLIC SERVICE COMMISSION,
The PUBLIC UTILITIES COMMISSION OF OHIO and the
MARYLAND OFFICE OF PEOPLE'S COUNSEL,
Appellants No. 92-7398

(D.C. Civil No. 92-00241)

IN RE: COLUMBIA GAS SYSTEMS, INC.;
MARYLAND OFFICE/PEOPLE'S COUNSEL

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANSMISSION CORPORATION

THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTIONS INC.,
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
Intervenor in support of
Appellants
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE
COMMONWEALTH OF KENTUCKY,
Intervenor in support of
Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF
COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATURAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of
Official Committee of Customers
of the Columbia Gas
Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS TRANSMISSION COMPANIES,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
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TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of
Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenors in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
the MARYLAND PUBLIC SERVICE COMMISSION,
the PUBLIC UTILITIES COMMISSION OF OHIO and the
MARYLAND OFFCE OF PEOPLE'S COUNSEL,
Appellants No. 92-7399

(D.C. Civil No. 92-00242)

IN RE: COLUMBIA GAS SYSTEMS, INC.;
PUBLIC UTILITIES COMMISSION/OHIO

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANSMISSION CORPORATION

THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC.,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
Intervenor in support of Appellants
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE
COMMONWEALTH OF KENTUCKY,
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF
COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA (OPC),
Intervenor in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL, STATE OF OHIO (OCC),
Intervenor in support of Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION, the MARYLAND PUBLIC SERVICE COMMISSION, the PUBLIC UTILITIES COMMISSION OF OHIO and the MARYLAND OFFICE OF PEOPLE'S COUNSEL,
Appellants No. 92-7400

(D.C. Civil No. 92-00243)

IN RE: COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION
THOMAS E. ROSS,
Trustee

TENNESSEE GAS PIPELINE COMPANY,
Intervenor-defendant

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of
Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of
Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC
SERVICE COMMISSION OF WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE NATURAL GAS COMPANY
("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenors in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

WEST OHIO GAS COMPANY,
THE PEOPLES NATURAL GAS COMPANY and
VIRGINIA NATURAL GAS, INC.,
Appellants No. 92-7410

(D.C. Civil No. 92-00127)

IN RE: COLUMBIA GAS SYSTEMS INC.;
WEST OHIO GAS CO.;
VIRGINIA NATURAL GAS, INC.;
PEOPLES NATURAL GAS COMPANY,
Appellants No. 92-7411

(D.C. Civil No. 92-00238)

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANSMISSION CORPORATION
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
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(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION ("TCo"),
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

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MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of
Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA (OPC),
Intervenor in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL, STATE OF OHIO (OCC),
Intervenor in support of Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court 10/23/92 order)

IN RE: COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF THE COLUMBIA GAS TRANSMISSION CORPORATION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION
THOMAS E. ROSS,
Trustee

TENNESSEE GAS PIPELINE COMPANY,
Intervenor-defendant

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

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Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
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A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

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Intervenors in support of
Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of
Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
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(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF THE COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Appellant No. 92-7412

(D.C. Civil No. 92-00127)

IN RE: COLUMBIA GAS SYSTEMS INC.;
OFFICIAL COMMITTEE/CUSTOMERS

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of
Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE ON UNSECURED CREDITORS OF
COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA"); THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of Appellant
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA (OPC),
Intervenor in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL, STATE OF OHIO (OCC),
Intervenor in support of Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS ("Customer Committee") OF THE COLUMBIA GAS TRANSMISSION CORPORATION ("TCo"),
Appellant No. 92-7413

(D.C. Civil No. 92-00236)

IN RE: COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THOMAS E. ROSS,
Trustee

TENNESSEE GAS PIPELINE COMPANY,
Intervenor-defendant

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNCIL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCO"),
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO;
Intervenors in support of
Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

COLUMBIA GAS OF KENTUCKY,
COLUMBIA GAS OF MARYLAND,
COLUMBIA GAS OF OHIO,
COLUMBIA GAS OF PENNSYLVANIA, AND
COMMONWEALTH GAS SERVICES, collectively
known as the COLUMBIA GAS DISTRIBUTION COMPANIES,
Appellants No. 92-7414

(D.C. Civil No. 92-00127)

IN RE: COLUMBIA GAS SYSTEMS INC.;
PENNSYLVANIA PUBLIC UTILIY COMMISSION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS ("Customer Committee") OF COLUMBIA GAS TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION; MARYLAND PUBLIC SERVICE COMMISSION; PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA"); THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA (OPC),
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL, STATE OF OHIO (OCC),
Intervenors in support of Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Appellants No. 92-7415

(D.C. Civil No. 92-00241)

IN RE: COLUMBIA GAS SYSTEMS INC.;
MERIDAN OIL PRODUCTION INC.

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANS.,
THOMAS E. ROSS,
Trustee

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
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OFFICE OF THE PEOPLE'S COUNSEL FOR THE
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Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS ("Customer Committee") OF COLUMBIA GAS TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

OZARK GAS TRANSMISSION SYSTEM AND OZARK FINANCE CORPORATION,
Appellants No. 92-7435

(D.C. Civil No. 92-00239)

IN RE: COLUMBIA GAS SYSTEMS, INC.; OZARK GAS TRANSMISSION SYSTEM; OZARK FINANCE CORP.,
Appellants No. 92-7436

(D.C. Civil No. 92-00240)

v.

COLUMBIA GAS SYSTEMS, INC.; COLUMBIA GAS TRANS.; THOMAS E. ROSS,
Trustee

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

IN RE: COLUMBIA GAS SYSTEMS INC.;
MERIDIAN OIL PRODUCTION INC.

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANS;
THOMAS E. ROSS,
Trustee

OZARK GAS TRANSMISSION SYSTEM AND
OZARK FINANCE CORPORATION,
Appellants No. 92-7499

OZARK GAS TRANSMISSION SYSTEM; OZARK FIN. CORP.,
Appellants No. 92-7499

(D.C. Civil No. 92-00239)

IN RE: COLUMBIA GAS SYSTEMS, INC.;
OZARK GAS TRANSMISSION SYSTEM;
OZARK FINANCE CORP.,
Appellants No. 92-7500

(D.C. Civil No. 92-00240)

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANS.;
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION, INC.
Intervenor-Appellee
(per Court order dated
11/6/92)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*; BECKER, SCIRICA, COWEN, NYGAARD and LEWIS, *Circuit Judges*

The petition for rehearing filed by appellee the Official Committee of Unsecured Creditors of Columbia Gas Transmission Corporation having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Becker would have granted rehearing in banc as would Judge Nygaard for the reasons set forth in his dissenting opinion.

By the Court,

/s/ Robert E. Cowen
Circuit Judge

Dated: Aug. 06, 1993

APPENDIX E

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

Case Nos. 91-803 and 91-804

IN RE: THE COLUMBIA GAS SYSTEM, INC., and
COLUMBIA GAS TRANSMISSION, CORPORATION,
Debtors.

OBJECTION OF THE UNITED STATES OF AMERICA TO MOTION OF COLUMBIA GAS TRANSMISSION CORPORATION FOR AN ORDER APPROVING A SETTLEMENT OF ITS 1990 RATE CASE BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION AND AUTHORIZING PAYMENT OF SETTLEMENT AMOUNT

The United States of America, by and through undersigned counsel, hereby objects to the Motion of Columbia Gas Transmission Corporation ("TCo") for an Order Approving a Settlement of its 1990 Rate Case Before the Federal Energy Regulatory Commission and Authorizing Payment of Settlement Amount ("Motion").

STATEMENT

TCO seeks an order of this Court approving a settlement of its 1990 rate case before the Federal Energy Regulatory Commission ("FERC") FERC Docket no. RP90-108-000. Among other things the settlement "(i) establishes TCO's . . . costs of service and throughput for the period from November 1, 1990 through November 30, 1991; (ii) sets forth the rates TCO . . . may charge [its] customers for the period from November 1, 1990 through November 30, 1991; (iii) provides that, subject to any necessary Bankruptcy Court approval, TCO . . . [is] to pay $58.5 million . . . in refunds (principal) to their

customers, plus interest at FERC-Established rates; . . ." Motion at pp. 2-3.

ARGUMENT

The United States of America has no objection to the parties to the FERC case entering into a settlement: establishing TCO's costs of service and throughput for the period from November 1, 1990 through November 30, 1991 and establishing the rates TCO may charge its customers for the same period. Nor does the United States object to the fixing of the amount of the refund *claims* of the customers at $58.5 million, plus pre-petition interest at FERC-established rates. Furthermore, the United States does not contest TCO's entitlement to pay that portion of the customer refunds attributable to TCO's *post-petition* rate collections, as an expense of administration of TCO's estate.[1]

The United States does object to the settlement to the extent that it requires TCO to pay that portion of customer refunds attributable to TCO's *pre-petition* rate collections. For the reasons set forth in the Opposition of the Official Committee of Unsecured Creditors of Columbia Gas Transmission Corporation to the Motion of Columbia Gas Transmission Corporation for an Order Approving a Settlement of its 1990 Rate Case Before the Federal Energy Regulatory Commission and Authorizing Payment of Settlement Amount, which is incorporated herein by reference, the United States respectfully requests that the Court deny TCO's Motion to the extent it seeks authority to pay customer refunds attributable to *pre-petition* rate collections, and submits that the customers be treated as having general unsecured claims for these pre-petition amounts, and dealt with as all other

[1] As TCO concedes in its Motion the settlement involves payment of refunds to customers for both pre- and post- petition periods encompassing the period November 1, 1990 through November 30, 1991. This time frame includes approximately nine pre-petition months and four post-petition months. *See*, Motion at 14 ¶ 17.

general unsecured claimants under TCO's forthcoming plan of reorganization.

Dated: June 10, 1993.

Respectfully submitted,

WILLIAM C. CARPENTER, JR.
United States Attorney

ELLEN SLIGHTS
Assistant U.S. Attorney

/s/ Karl J. Fingerhood
KARL J. FINGERHOOD
STUART D. GIBSON
Trial Attorneys, Tax Div.
U.S. Dept. of Justice
P.O. Box 227
Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 307-0855
(202) 307-6586

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the foregoing OBJECTION OF THE UNITED STATES OF AMERICA TO MOTION OF COLUMBIA GAS TRANSMISSION CORPORATION FOR AN ORDER APPROVING A SETTLEMENT OF ITS 1990 RATE CASE BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION AND AUTHORIZING PAYMENT OF SETTLEMENT AMOUNT upon interested parties to this proceeding on the 10th day of JUNE, 1993, by causing true and correct copies thereof to be placed in the United States mail, postage prepaid, to those persons on the attached sheets.

/s/ Karl J. Fingerhood
KARL J. FINGERHOOD

(2)

Supreme Court, U.S.
FILED
DEC 15 1993
OFFICE OF THE CLERK

No. 93-695

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

OFFICIAL COMMITTEE OF UNSECURED CREDITORS
of COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, et al.,
Respondents.

BRIEF IN OPPOSITION TO

PETITION FOR A WRIT OF CERTIORARI

Andrew J. Sonderman
James R. Berendsen*
John L. Shailer
200 Civic Center Drive
Columbus, Ohio 43215
(614) 460-4650
John J. Dilenschneider
Squire, Sanders & Dempsey
41 S. High Street
Columbus, Ohio 43215
(614) 365-2789

Counsel for Respondents
The Columbia Gas
Distribution Companies

*Admitted before the Court

15 pp

LIST OF PARTIES AND RULE 29.1 List

The list of parties are substantially as contained in the list provided by Petitioner except that the Respondents herein known as "The Columbia Gas Distribution Companies" are actually five separate companies: Columbia Gas of Kentucky, Inc., Columbia Gas of Maryland, Inc., Columbia Gas of Ohio, Inc., Columbia Gas of Pennsylvania, Inc. and Commonwealth Gas Services, Inc.

These five companies are wholly owned subsidiaries of The Columbia Gas System, Inc.

TABLE OF CONTENTS

PAGE

LIST OF PARTIES AND RULE 29.1 LIST i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT 5

FEDERAL COURTS PROPERLY UTILIZE FEDERAL COMMON LAW WHEN DETERMINING PROPERTY RIGHTS IN A BANKRUPTCY PROCEEDING WHEN THE PROPERTY RIGHT HAS BEEN CREATED BY FEDERAL MANDATE 5

I. There is no conflict between the Circuits - Each case must be decided on its own circumstances 5

II. The Third Circuit Decision is consistent with Decisions of this Court 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES **PAGE**

Associated Gas Distribs. v. FERC,
893 F.2d 349 (D.C. Cir. 1989),
cert. denied, 111 St. Ct. 277
(1990) 1

Brown v. Pennsylvania State Employees Credit Union,
851 F.2d 81 (3rd Cir 1988) 3

Butner v. United States,
440 U.S. 48 (1979) 5

Hines v. Davidowitz,
312 U.S. 52 (1941) 5, 6

In Re Iowa R.R.,
840 F.2d 535 (7th Cir. 1988),
cert. denied, 488 U.S. 899 (1988) 6, 7

In Re Penn Central Transportation Co.,
486 F.2d 519 (3d Cir. 1973),
cert. denied, 415 U.S. 990 (1974) 3

Matter of Lehigh and N.E. Ry Co.,
657 F.2d 570 (3d Cir. 1981) 3

Meridian Bank v. Alten,
958 F.2d 1226 (3d Cir. 1992) 3

Pennsylvania v. Nelson,
350 U.S. 497 (1956) 5, 6

Texas Industries v Radcliff Materials,
451 U.S. 630 (1981) 8

United States v. Kimbell Foods, Inc.,
440 U.S. 715 (1979) 6, 9

United States v. Little Lake Misere L. Co.,
412 U.S. 580 (1973) 8, 9

STATUTES

Bankruptcy Code, 11 U.S.C. §541 ..... 1, 4
Natural Gas Act, 15 U.S.C. §717, et seq 4, 7

STATEMENT OF THE CASE

Petitioner, Official Committee of Unsecured Creditors (herein Petitioner), has not provided the Court with a statement of the case but rather with a misleading and inaccurate argument. It is therefore incumbent upon the Respondents to state the case fairly.

1. Bankruptcy Court Proceeding

The Debtor, Columbia Gas Transmission Corporation (herein Debtor), is an interstate pipeline company which filed Chapter 11 proceedings in the Bankruptcy Court for the District of Delaware on July 31, 1991. The Debtor is regulated by the Federal Energy Regulatory Commission (herein FERC).[1]

On August 23, 1991, the Debtor filed a motion in Bankruptcy Court seeking "authorization to comply with its Federal Energy Regulatory Commission Gas Tariff and orders and regulations of the Federal Energy Regulatory Commission." Pet. App. 123a.[2] Those tariffs and orders of FERC required the Debtor to make refund payments to its customers which are local gas distribution companies (LDC) and to make surcharge payments to the Gas Research Institute. The refunds result from prior overcharges for gas supplies incurred by the customers of the Debtor and the ultimate consumers served by those customers as determined by the Court of Appeals for the District of Columbia. Pet. App. 49a, citing *Associated Gas Distribs. v. FERC*, 893 F.2d 349 (D.C. Cir. 1989) *cert. denied*, 111 S.Ct. 277 (1990). Whether the refund payments are property of the Debtor's estate under 541(d) of the Bankruptcy Code was the question presented to the Bankruptcy Court.

The Bankruptcy Court held a three day evidentiary hearing on the Motion. The focus of the evidentiary hearing was the federal

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[1] For the period pertinent to this proceeding, Debtor transported and sold natural gas at wholesale to affiliated and unaffiliated distribution companies through its 18,900 mile pipeline network serving parts of 15 states.

[2] The Petition will be referred to as "Pet." and the Petition Appendices will be referred to as "Pet. App."

regulatory requirements placed on the Debtor and the Debtor's mechanisms for complying with those requirements. The hearing also provided evidence to the effect that each LDC to which Debtor supplied gas was subject to state regulation that mirrored the federal regulatory scheme.[3] No evidence or information was presented to the Bankruptcy Court concerning the property or trust law of any state.

The Petitioner argued that state law should apply. The Bankruptcy Court, in its decision of February 13, 1992, concluded that federal common law should apply and that under federal common law, particularly as applicable in the Third Circuit, the Debtor had proven that the refunds were held in trust when received. The Bankruptcy Court did qualify its ruling by holding that certain refunds, those that were to have been collected by or before the Bankruptcy petition date, were restricted by a federal common law trust doctrine known as the lowest intermediate balance test.

2. District Court

The Petitioner appealed the Bankruptcy Court's determination to the District Court arguing that the Bankruptcy Court erred in applying federal law, rather than state law, and that the Bankruptcy Court erred in finding that the supplier refunds were held by the Debtor in trust for its customers. The Customers Committee also appealed, contending that the Bankruptcy Court erred in ruling that the payment of those refunds collected by the petition date should be limited by the lowest intermediate balance test.

Following briefing and oral argument, the District Court issued an order on July 6, 1992, reversing the Bankruptcy Court. The District Court said that the Bankruptcy Court erred in applying federal, rather than state law. Pet. App. 95a *et seq.* The District Court

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[3] In order that each LDC charge fair and reasonable rates under state requirements, each LDC is required to pass along refunds ordered by FERC to the ultimate consumers. It is these ultimate consumers who were originally overcharged for gas service and who will be beneficiary of refunds as to the overcharges. Affiliated distribution companies must also pass refunds to their ultimate consumers. Contrary to the constant innuendo in the Petition, the affiliated LDCs are treated no differently than other distribution companies and in fact are likely to be more closely scrutinized by their State Utility Commissions because of the affiliation.

made this ruling despite concluding that the Bankruptcy Court's findings of fact were not clearly erroneous. Instead, the District Court determined that it should reject application of federal common law, based on its conclusion that federal regulation of the natural gas industry is far less pervasive than federal regulation of the railroad industry. Pet. App. 95a-97a. Thus, the District Court rejected the application of *Matter of Lehigh and N.E. Ry. Co.*, 657 F.2d 570 (3d Cir. 1981) and *In Re Penn Central Transportation Co.*, 486 F.2d 519 (3d Cir. 1973), *cert. denied*, 415 U.S. 990 (1974). The District Court went on to apply state trust law and determined that, under state law, a trust relationship did not exist.

3. Circuit Court

Numerous parties, including these Respondents, Columbia Gas of Kentucky, Inc., Columbia Gas of Maryland, Inc., Columbia Gas of Ohio, Inc., Columbia Gas of Pennsylvania, Inc. and Commonwealth Gas Services (collectively known as The Columbia Gas Distribution Companies) appealed the District Court's determination to the Third Circuit Court of Appeals. The Circuit Court exercised the same review over the Bankruptcy Court's order as did the District Court. Pet., App. 55a, citing *Brown v. Pennsylvania State Employees Credit Union*, 851 F.2d 81, 84 (3d Cir. 1988). That is, the Bankruptcy Court's factual findings are not disturbed unless clearly erroneous but the Circuit Court conducts a plenary review of ultimate legal conclusions. *Meridian Bank v. Alten*, 958 F.2d 1226, 1229 (3d Cir. 1992).

Using that standard of review, the Circuit Court concluded that federal common law should apply and that under federal common law a "trust" was created whereby the refunds in question were held in trust. In declining to consider state law, the Circuit Court noted that "... FERC's objective of ensuring the exploited customers to receive the full amount of their refunds would be subverted by state law. Application of the federal common law rule is necessary to prevent such an outcome." Pet. App. 50a.

In his dissent, Judge Nygaard of the Third Circuit, suggested that traditional trust law should not be applied and that "Instead, we should balance the competing policies and try to discern congressional intent behind the Bankruptcy Code, 11 U.S.C. §§541(d), and the Natural Gas Act (NGA), 15 U.S.C. §717 et seq.", Pet. App. 71a. Judge Nygaard concluded that the refunds should be made without the limitation of the lowest intermediate balance doctrine applied under a trust theory.

ARGUMENT

FEDERAL COURTS PROPERLY UTILIZE FEDERAL COMMON LAW WHEN DETERMINING PROPERTY RIGHTS IN A BANKRUPTCY PROCEEDING WHEN THE PROPERTY RIGHT HAS BEEN CREATED BY FEDERAL MANDATE

I

There is no conflict between the circuits-each case must be decided on its own circumstances

In concluding its argument that "the courts of appeal have taken widely diverging approaches to the appropriate scope of federal common law preemption" (Pet. 8), Petitioner states that "in the Seventh Circuit, federal law will rarely, if ever, preempt state trust law with respect to claims against a federally-regulated bankrupt, while in the Third Circuit federal law now will always preempt state law ..." Pet. 14.

On the contrary, in making determinations as to choice of law questions, the federal courts do not act automatically as Petitioner suggests, but consider the facts and circumstances in each case before them. As we shall point out, Petitioner has equated failure to reach a uniform result with failure to follow this Court's mandate to analyze each case on its merits.

Property rights in a bankruptcy are created and defined by state law unless a federal interest requires a different result. *Butner v. U.S.*, 440 U.S. 48, 54 (1979). Petitioner assumes that this dictum in *Butner* presents a question of "preemption".[4] As Justice Black stated in *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) and Chief Justice Warren reiterated in *Pennsylvania v. Nelson*, 350 U.S. 497 (1955), federal courts have used "preemption" interchangeably with other terminology. Typically, preemption has often been referred to by many different terms: "conflicting; contrary to; occupying the

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[4] These Respondents do not agree with Petitioner that the question presented in this case is one of "preemption" in the traditional sense, that is where federal law is in direct actual conflict with state law, but concedes the use of "preemption" for purposes of responding to the Petition.

field; repugnance; difference; unreconcilability; inconsistency; violation; curtailment and interference." *Hines*, 312 U.S. at 67; *Nelson*, 350 U.S. at 502. Justice Black stated, "In the final analysis, there can be no one crystal clear formula... Our primary function is to determine whether under the *circumstances of this particular case*... [state law conflicts with federal law], (emphasis supplied). *Hines*, 312 U.S. at 67.

Determining the circumstances of a case where a federal regulatory program is involved requires the examination of the "nature" of the federal program to determine the choice of law question. As Justice Marshall has stated, "federal programs that by their *nature* are and must be uniform in character" necessitate application of federal law, (emphasis supplied). *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979).

The only way to determine the "circumstances" of a case or the "nature" of the federal program or scheme is to look at both law and fact. That is what the Seventh Circuit did in *In Re Iowa R.R.*, 840 F.2d 535 (7th Cir. 1988), *cert. denied*, 488 U.S. 899 (1988). In *Iowa*, the Court had before it the question of whether certain interline balances of the Debtor Railroad in a Bankruptcy proceeding were held in trust for the benefit of other carriers.[5] The Seventh Circuit reviewed federal statutory law and found that the Interstate Commerce Commission (ICC) had not exercised regulatory power over interline balances and that the ICC accounting rules did not apply to small railroads such as Iowa Railway Company. The Court then reviewed federal policy and found that there was no longer a federal plan for coordinating and preserving a national transportation system.[6] Against this backdrop, the Seventh Circuit then stated that the circumstances before the Court indicated, "Private parties stand on both sides of this transaction. Congress has not occupied the field in question". *Iowa*, 840 F2d at 540. The Court then concluded that in the circumstances of the case before it, "It is not

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[5] As explained in *Iowa*, interline balances involve those occasions where the originating carrier receives payment for the entire movement of a commodity and then sets off that amount against other transactions.

[6] Both *Penn Central, supra* and *Lehigh, supra* were decided based on circumstances as they existed before the passage of the new Rail Transportation Policy.

so *clearly* important that a federal court may create federal common law to trump the state law. . .", (emphasis supplied). *Iowa,* 840 F2d at 542.

The circumstances presented to the Third Circuit in this case were entirely different from those in *Iowa.* In looking at the "circumstances" of this case, the Third Circuit came to a different conclusion than the Seventh Circuit in *Iowa.* In this case the Third Circuit had to determine if refunds resulting from an Order of the FERC were held in trust by the Debtor. The Third Circuit reviewed federal statutory law and found that the refunds at issue were created by an order of the Federal Energy Regulatory Commission (Pet. App. 48a) and that the Debtor maintained its accounts in accordance with the accounting system promulgated by FERC. Pet. App. 43a. The Court then reviewed federal policy and found that "a national uniform law is necessary." Pet. App. 48a. Against this backdrop the Third Circuit stated, "the very purpose of the NGA (Natural Gas Act) is to supersede private contractual arrangements that interfere with the federal objective" and concluded "the property right Columbia has in these refunds should not be subject to the vagaries of a state trust law." Pet. App. 49a.

Both the Seventh Circuit in *Iowa* and the Third Circuit in this case used a similar analysis of the facts and the applicable federal statutes and policy to determine whether a federal interest required that federal law be applied. The result of the analysis in *Iowa* was that state law applied; the result of the same analysis by the Third Circuit in this case was that federal law applied. The results were different, but the analysis was the same. So long as each court conducts this analysis of law and fact, the conflict suggested by Petitioner does not exist and there is no reason for this Court to grant certiorari.

II
The third Circuit decision is consistent with decisions of this court

Petitioner urges that the Third Circuit's decision is "flatly inconsistent with numerous decisions of this Court ...". Pet. 9. This argument is not valid. The Third Circuit's decision is in accord with the pronouncements of this Court.

Although application of state law may often be favored in a dispute giving rise to an action in federal Court, there is always an exception for application of federal law if the federal interest is sufficient to warrant it. *Butner, supra.* Chief Justice Burger recognized the parameters for the application of federal common law in *Texas Industries v Radcliff Materials,* 451 U.S. 630 (1981). There he stated that "the Court has recognized the need and authority in some limited areas to formulate what has come to be known as 'federal common law' (citation omitted)" and noted federal common law should apply when 'necessary to protect uniquely federal interests' (citation omitted) 451 U.S. at 640. Chief Justice Burger has elaborated on the use of federal common law by the federal judiciary in *United States v. Little Lake Misere L. Co.,* 412 U.S. 580 (1973) at 593:[7]

> ...At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or 'judicial legislation,' rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress. In other words, it must mean recognition of federal judicial competence

[7]While the United States was a party in *Little Lake Misere Land Co.,* which Petitioner will suggest distinguishes it, it is cited for Chief Justice Burger's statement on effective use of federal common law by the federal courts.

> to declare the governing law in an area comprising issues substantially related to an established program of government operation.' Mishkin, 105 U Pa L Rev, at 800.

The Third Circuit's decision is in harmony with this dictum and also is in accord with this Court's statement in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). In *Kimbell Foods*, Justice Marshall stated:

> Controversies directly affecting the operation of federal programs although governed by federal law, do not inevitably require resort to uniform federal rules ... (citations omitted). Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law'. Citing *United States v. Standard Oil Co.*, 323 U.S. 301 (1947). *Kimbell Foods*, 440 U.S. at 727-28.

There is one conclusion readily drawn from this Court's previous discussion of choice of law, which serves as a mandate to the lower federal courts: it is incumbent on a federal court to make a complete and thorough examination of the nature of the federal program or scheme based on the circumstances of the particular case.

The Third Circuit carried out this mandate consistent with the decisions of this Court when it examined the circumstances of this case.

CONCLUSION

These Respondents assert that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Andrew J. Sonderman
James R. Berendsen*
John L. Shailer
200 Civic Center Drive
Columbus, Ohio 43215
(614) 460-4650
John J. Dilenschneider
Squire, Sanders & Dempsey
41 S. High Street
Columbus, Ohio 43215

Counsel for Respondents
The Columbia Gas Distribution
Companies

*Admitted before the Court

No. 93-695

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT OFFICIAL COMMITTEE OF CUSTOMERS OF COLUMBIA GAS TRANSMISSION CORPORATION

LESLIE A. NICHOLSON, JR.*
ROGER M. WHELAN
MICHAEL L. STERN
MARK H. BERMAN
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

WILLIAM F. SHEEHAN
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000
Counsel for Respondent

* Counsel of Record

December 17, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether, in construing the Bankruptcy Code, the court of appeals applied the appropriate test in deciding that federal common law rather than state law should govern.

LIST OF PARTIES AND RULE 29.1 LIST

The caption of the decision below (Pet. App. 1a-37a)* contains the names of the parties.

The Official Committee of Customers of Columbia Gas Transmission Corporation is the official body appointed by the United States Trustee pursuant to Section 1102 of the Bankruptcy Code, 11 U.S.C. § 1102, to represent the interests of the customers of Columbia Gas Transmission Corporation. The publicly held customers on whose behalf the Committee acts are:

Baltimore Gas and Electric Company
Central Hudson Gas & Electric Corp.
Columbia Gas Distribution Co.
Commonwealth Gas Services, Inc.
Corning Natural Gas Corp.
Delmarva Power and Light Co.
Delta Natural Gas Company, Inc.
Eastern Short Natural Gas Company, Inc.
Elizabethtown Gas Company, Inc.
Kentucky Ohio Gas
Lakeside Gas
Mountaineer Gas Company
National Fuel Gas Supply Corp.
National Gas & Oil, Inc.
New Jersey Natural Gas Company
New York State Electric & Gas Corp.
North Carolina Natural Gas Corp.
Northeast Ohio Gas
Orange and Rockland Utilities, Inc.
Pennslyvania Gas & Water Company
Peoples Natural Gas Co.
Piedmont Natural Gas Company, Inc.
Roanoke Gas Company, Inc.
South Jersey Gas Company
The Cincinnati Gas & Electric Company

* "Pet. App." citations are to the appendix to the petition.

The Dayton Power and Light Company
The Providence Gas Company
The Union Light, Heat & Power Company
UGI Corp.
Verona Natural Gas
Virginia Natural Gas Corp.
Washington Gas Light Company
West Ohio Gas Company, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 29.1 LIST	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
1. Background	2
2. The Refunds At Issue Here	3
3. The Proceedings Below	4
REASONS FOR DENYING THE WRIT	6
I. THE PETITION MISCHARACTERIZES THE DECISION BELOW	6
II. THERE IS NO CONFLICT AMONG THE CIRCUITS	9
III. THE RESULT BELOW WAS CORRECT	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES Page

Associated Gas Distribs. v. FERC, 893 F.2d 349 (D.C. Cir. 1989), *cert. denied*, 498 U.S. 907 (1990) 3
Burks v. Lasker, 441 U.S. 471 (1979) 7, 8
Butner v. United States, 440 U.S. 48 (1979) 7, 13
Columbia Gas Trans. Corp. v. Exclusive Natural Gas Storage Easement, 962 F.2d 1192 (6th Cir.) *cert. denied*, 113 S. Ct. 659 (1992) 8
In re Iowa R.R., 840 F.2d 535 (7th Cir.), *cert. denied*, 488 U.S. 899 (1988) 9
In re Penn Central Transportation Co., 486 F.2d 519 (3rd Cir. 1973) 10
Kamen v. Kemper Financial Services, Inc., 111 S. Ct. 1711 (1991) 6, 7
Lewis v. Manufacturers National Bank of Detroit, 364 U.S. 603 (1961) 13
Missouri Pac. R.R. Co. v. Escanaba & Lake Superior R.R., 897 F.2d 210 (6th Cir. 1990) 10
T&B Scottsdale Contractors, Inc. v. United States, 866 F.2d 1372 (11th Cir.), *cert. denied*, 493 U.S. 846 (1989) 13
United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div., 358 U.S. 103 (1959) 3
United States v. Kimbell Foods, 440 U.S. 715 (1979) 4
United States v. Little Lake Misere Land Co., Inc., 412 U.S. 580 (1973) 7
United States v. Standard Oil Co. of Calif., 332 U.S. 301 (1947) 7

STATUTES

Bankruptcy Reform Act of 1978, As Amended (1993)
11 U.S.C. § 541(d) 4, 5, 6, 7, 8
Natural Gas Act (1988 & Supp. III 1991)
15 U.S.C. §§ 717c 2
15 U.S.C. §§ 717-717(W) 2

REGULATIONS

11 C.F.R. pt. 201 (1993) 3

TABLE OF AUTHORITIES—Continued

OTHER Page

Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797 (1957) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-695

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT OFFICIAL COMMITTEE OF CUSTOMERS OF COLUMBIA GAS TRANSMISSION CORPORATION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-74a) is reported at 997 F.2d 1039. The opinion of the district court (Pet. App. 75a-122a) is not reported. The opinion of the bankruptcy court (Pet. App. 123a-144a) is reported at 136 B.R. 930.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1993. The order of the court of appeals denying the Creditor Committee's petition for rehearing was entered on August 6, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved appear in the petition. (Pet. 2).

STATEMENT OF THE CASE

1. *Background.* This case arises out of the bankruptcy of Columbia Gas Transmission Corporation ("Columbia"), the owner and operator of a large natural gas pipeline. Columbia purchases natural gas from upstream pipeline suppliers, transports the gas in interstate commerce, and resells it to local distribution companies who in turn sell it to the gas-consuming public.

Both Columbia and its upstream pipeline suppliers are extensively regulated by the Federal Energy Regulatory Commission ("FERC") pursuant to the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717(W) (1988 & Supp. III 1991). Under the NGA, a regulated entity may charge only "just and reasonable" rates. 15 U.S.C. § 717c. FERC normally exercises its ratemaking authority by allowing proposed rate increases to go into effect subject to its power to order refunds if it determines, after a hearing, that the new rate is not just and reasonable.

Part of Columbia's rate to each of its customers is determined, under applicable FERC orders and tariffs, by certain charges made by Columbia's upstream suppliers and then passed on by Columbia, acting as a conduit, to its customers. When, in the exercise of its ratemaking authority, FERC orders Columbia's upstream suppliers to make refunds, those refunds are flowed through Columbia dollar-for-dollar to Columbia's customers, and, ultimately, to the gas-consuming public.[1] Columbia's obligation to flow through such refunds is imposed by law and cannot be altered by private agreement between Columbia and its

[1] Some of Columbia's customers are affiliated with Columbia, but those customers themselves must flow through any refunds received to the ultimate consumers. (Pet. App. 59a-60a). Thus, neither Columbia nor its affiliates stand to gain from flowing through the refunds.

suppliers or customers. This is because "FERC's ability to regulate gas rates is not in any way limited by the existence of private contracts since all contracts are 'subject of course to any overriding authority of the Commission.' " (*Id.*, quoting *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 114 (1959)).[2]

2. *The Refunds At Issue Here.* In 1988, various upstream suppliers of Columbia made filings pursuant to FERC Order 500, which permitted them to recover a portion of the costs they incurred in buying out or buying down certain so-called "take-or-pay" contracts with gas producers. (Pet. App. 127a). Under Order 500, Columbia's suppliers had collected, through Columbia, approximately $250 million from Columbia's customers, who had collected that amount from the gas-consuming public, when the D.C. Circuit held that the allocation methodology used by FERC to allocate the "take or pay" costs among customers was unlawful, and vacated Order 500. *Associated Gas Distribs. v. FERC,* 893 F.2d 349, 362-63 (D.C. Cir. 1989), *cert. denied,* 498 U.S. 907 (1990). FERC subsequently issued Order 528, requiring the pipelines that had made Order 500 tariff filings to file revised tariffs using lawful allocation methods and to refund the unlawful overcharges collected under Order 500.

The "take or pay" refunds constitute about $134 million of the $161 million at issue here. The remaining refunds consist of other overcharges for gas transportation services. (Pet. App. 43a). All of the disputed refunds

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[2] Federal law also dictates how Columbia accounts for the customer refunds. FERC regulations set forth a detailed uniform system of accounts which natural gas companies like Columbia must follow. *See* 18 C.F.R. pt. 201 (1993). The regulations dictate the manner in which accounting records must be kept and reported. (Pet. App. 128a-129a). Columbia's accounts thus track all customer refunds by period, legal type, upstream sources, and downstream recipient. (*Id.*)

were ordered by FERC to be paid by Columbia's upstream suppliers and to flow through Columbia to its customers and, ultimately, to the consumers. (*Id.* at 59a-60a).

3. *The Proceedings Below.* Columbia itself has no interest in these refunds. Its role is to receive them from its upstream suppliers and pass them down to its customers in accordance with applicable FERC orders and tariffs. (Pet. App. 59a-60a & n.11). Accordingly, shortly after filing for bankruptcy, Columbia moved for authorization to comply with FERC orders and its own tariff and to flow through to its customers the refunds that it had received or would receive in the future. Columbia took the position that it held no equitable interest in the refunds and that, accordingly, the refunds were not property of the debtor under § 541(d) of the Bankruptcy Code. Columbia's unsecured creditors opposed the motion, contending that the refunds should be treated as Columbia's property and made available to pay their claims.

The bankruptcy court granted Columbia's motion, applying federal common law and ruling that the customer refunds are not property of Columbia's estate but are held in trust for the benefit of Columbia's customers. (*Id.* at 134a-136a). The district court reversed, concluding that state law should apply and that under state law the customer refunds should be considered property of Columbia's estate. (*Id.* at 101a-104a).

The court of appeals in turn reversed the district court. It applied the three factors identified in *United States v. Kimbell Foods,* 440 U.S. 715 (1979), and ruled that federal common law should govern because, among other reasons addressed more fully below, application of state law would frustrate the central purpose of the NGA of assuring just and reasonable rates. The Third Circuit then held, in light of the factual findings made by the bankruptcy court, that the customer refunds were held in trust by Columbia and were, therefore, excluded from

Columbia's estate under § 541(d). (Pet. App. 55a-63a). On a secondary issue, the court applied the lowest intermediate balance test, a common law trust doctrine, to restrict the amount of prepetition customer refunds that could be flowed through to Columbia's customers.

In a separate opinion, Judge Nygaard concurred with the majority that Columbia's interest in the refunds should be decided as a matter of federal common law rather than state law, and that (although here his reasoning differed from the majority's) the customer refunds were not property of Columbia's estate. He dissented, however, from the majority's application of the lowest intermediate balance test. (Pet. App. 69a-74a).

FERC participated as an *amicus curiae* in the court of appeals. It argued that the application of federal common law was required to promote uniformity and to ensure that state law did not interfere with the overriding federal objective of just and reasonable rates under the NGA. Brief of Amicus Curiae Federal Energy Regulatory Commission, at 19-28, in *In re The Columbia Gas System, Inc. and Columbia Gas Transmission Corporation,* 3rd Cir., Nos. 92-7395 *et al.,* filed Oct. 2, 1992. FERC also noted that "[i]t was clearly not the intent of the Commission that Columbia have any equitable interest in the refunds it held temporarily before they were flowed through to its customers." *Id.* at 29.

REASONS FOR DENYING THE WRIT

This case involves only the application of settled law to particular facts. It presents no conflict among the circuits and raises no issue of general importance warranting review by this Court. The petition's contrary depiction of the decision below—as a sweeping, conflict-creating repudiation of this Court's teachings—relies on a fundamental mischaracterization of the Third Circuit's opinion, as we now show.

I. THE PETITION MISCHARACTERIZES THE DECISION BELOW.

The petition repeatedly misdescribes the breadth of the court of appeals ruling in this case—as, for example, when it says that "in the Third Circuit federal law now will *always* preempt state law" "with respect to claims against a federally regulated bankrupt" (Pet. 14; emphasis in original). That and other similar statements in the petition are demonstrably incorrect.

The Third Circuit began its analysis with the truism that the construction of a federal statute is a matter of federal law, citing *Kamen v. Kemper Financial Services Inc.*, 111 S. Ct. 1711, 1717 (1991). (Pet. App. 47a). "Therefore," the court continued, "federal law defines the parameters of section 541(d) of the Bankruptcy Code." (*Id.*) That incontestable statement, however, did not resolve the central question in this case, namely whether the issue under § 541(d) should be resolved by applying state law or by applying a uniform federal common law rule. The Third Circuit made that clear with its next words:

> This, however, is only the beginning of the inquiry. The determination that federal law applies does not inevitably require the application of a uniform federal rule. Applying federal law, courts may either fashion a uniform federal common law rule or adopt state law as the federal rule of decision.

(*Id.*) Far from stating that federal common law should always or normally displace state law as the rule of decision, the court explicitly stated the contrary:

> Developing a federal common law rule is the exception rather than the rule. Federal law should coincide with the relevant state law unless state law would undermine the objectives of the federal statutory scheme and there is a distinct need for nationwide legal standards.

(Pet. App. 48a). The court then carefully applied the factors set forth in this Court's decision in *Kimbell Foods* to determine whether a uniform federal standard was required. (*Id.* at 48a-55a).

The Third Circuit's initial observation was nothing more than a recognition that federal courts have the *power* to declare federal common law " 'to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress.' " *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580, 593 (1973) (quoting Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797, 800 (1957)). The existence of such federal judicial power, however, means only that state law does not apply "of its own force"; state law will still presumptively be adopted as the federal rule of decision unless federal interests require the application of a uniform federal standard. *See, e.g., Kamen*, 111 S. Ct. at 1717; *Burks v. Lasker*, 441 U.S. 471, 476-77 (1979); *Little Lake Misere*, 412 U.S. at 593-94; *United States v. Standard Oil Co. of California*, 332 U.S. 301, 307-09 (1947).[3]

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[3] The Creditor Committee does not argue that state law applies of its own force under § 541(d) of the Bankruptcy Code. The Creditor Committee acknowledges that under this Court's decision in *Butner v. United States*, 440 U.S. 48, 55 (1979), property rights under the Bankruptcy Code will generally be determined under state

The petition, however, suggests that the Third Circuit's introductory observation that federal statutory construction is a matter of federal law was not merely a threshold comment, but instead a holding on the central issue in the case—*i.e.*, a holding that *all* property determinations under § 541(d) are necessarily governed by federal common law rather than state law.[4] Only by so mischaracterizing the court's preliminary remark can the petition make the plainly incorrect statements, in addition to the one mentioned above, that: "in the Third Circuit, the federal common law exception has now completely swallowed the state law rule—the decision below holds that federal law governs *all* trust determinations under § 541(d) of the Bankruptcy Code" (Pet. 8-9) (emphasis in original); that "in the Third Circuit the mere existence of federal regulation suffices to preempt state trust and property law" (*id.* 12); and that the court below "greatly expanded the role of federal common law to *all* trust determinations pursuant to § 541(d)." (*Id.* 13) (emphasis in original).

Each of those statements is unsupportable. A fair reading of the ruling below shows that it was tied closely to the particular facts of this case, that it carefully ap-

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law unless "some federal interest requires a different result." (Pet. 8). The decision whether to apply state law under the Bankruptcy Code, like under other federal statutes, is thus a matter of federal choice. *See Burks*, 441 U.S. at 476.

[4] One of the cases on which the Creditor Committee relies began its choice of law analysis with a virtually identical threshold observation. *See Columbia Gas Trans. Corp. v. Exclusive Natural Gas Storage Easement*, 962 F.2d 1192, 1195 (6th Cir.) ("As an initial matter, we have no hesitation concluding, consistent with the threshold *Kimbell Foods* inquiry, that defining the contours of § 717F(h) [of the NGA] is an issue of federal law"), *cert. denied*, 113 S. Ct. 659 (1992). The Sixth Circuit then proceeded to apply the *Kimbell Foods* factors to determine whether federal common law or state law should be adopted as the federal rule of decision. *Id.* at 1195-96. It is unclear how the Creditor Committee could possibly distinguish the approach of the Sixth Circuit, which it approves, from that of the Third Circuit, which it disapproves.

plied the *Kimbell Foods* test, and that it went no farther than necessary to decide the narrow question whether the FERC-ordered refunds should be treated as estate property. The petitioner may be understandably disappointed in the result of the Third Circuit's weighing of the federal interests involved in this case, but it simply has no basis to attack the Third Circuit's approach to the choice of law issue.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS.

Contrary to the petition's assertion, the decision below does not conflict with *In re Iowa R.R.*, 840 F.2d 535 (7th Cir.), *cert. denied*, 488 U.S. 899 (1988). There the court of appeals, in a case involving interline railroad accounts, followed the same prescribed approach as the Third Circuit did in the case at bar. It noted that property rights under the Code are generally defined by state law but that, in some cases, and especially in cases of pervasive federal regulation, state law might be displaced by federal common law based on federal interests sufficiently strong to demand its creation. 840 F.2d at 537.[5] And although the Seventh Circuit, upon weighing the federal interests involved in that case, concluded that federal common law should *not* be created, a conflict cannot plausibly be set up between that case and the decision below since (a) both cases followed the same analysis and simply reached different conclusions based on the different factual circumstances confronting them, and (b) there is every reason to believe that, faced with the facts

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[5] Compare the Third Circuit's articulation of the governing test ("Federal law should coincide with the relevant state law unless state law would undermine the objectives of the federal statutory scheme and there is a distinct need for nationwide legal standards.") (Pet. App. 48a), with the Seventh Circuit's ("[O]nly a demonstration of a substantial conflict between state law and the achievement of an objective defined by federal law would support a conclusion that federal law controls.") (840 F.2d at 540).

of this case, the Seventh Circuit would reach the same result as the court below.[6]

Nor is it true that " '*Iowa R.R.* is a complete rejection of' " the Third Circuit's earlier decision in *In re Penn Central Transportation Co.*, 486 F.2d 519, 531-533 (3rd Cir. 1973) (*en banc*), *cert. denied*, 415 U.S. 990 (1974). (Pet. 13, quoting *Missouri Pac. R.R. Co. v. Escanaba & Lake Superior R.R.*, 897 F.2d 210, 213 (6th Cir. 1990)). It is true that *Penn Central* ruled that certain interline railroad accounts should be treated as trust funds and that *Iowa R.R.* found that other interline railroad accounts should be treated as property of the estate. But both courts followed the same analytical approach and, moreover, even their specific holdings were not in conflict: the *Iowa* court expressly noted that, had the Iowa railroad used the AAR on-line accounting system rather than the bill-and-voucher system, it might have decided the case in the same way as did the Third Circuit.[7]

In sum, the decision below does not conflict with *In re Iowa* or any other case. The supposedly conflict-creating decisions mentioned in the petition were concerned with certain narrow issues involving the interline railroad industry. By contrast, the Third Circuit here addressed entirely distinct issues involving a different industry and a different federal regulatory scheme. For example, while

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[6] That is because, to use the words of *Iowa R.R.*, in this case there *is* "a concrete federal interest with which the application of state law would interfere" (840 F.2d at 540)—the NGA's central goal of fair and reasonable rates—and there *is* a "substantial conflict between state law and the achievement of an objective defined by federal law" (*id.*).

[7] The most that can be said about the *Iowa* case is that, upon weighing the federal interests involved, it drew different conclusions from the factual circumstances surrounding interline railroad accounts than Judge Adams did, concurring in *Penn Central*. In denying certiorari in the *Iowa* case this Court has already concluded that that conflict was not worthy of review.

the interline railroad cases involved private, voluntary arrangements among the railroads, the case at bar involves interests (the FERC-ordered refunds) which were created by federal law, which are accounted for in elaborate detail pursuant to federal regulation, and which federal law requires to be flowed through to customers pursuant to a comprehensive federal scheme regulating the natural gas industry. In determining that federal common law should apply here, the court of appeals expressly found a *greater* federal interest in this case than exists in the interline railroad cases. (Pet. App. 51a-52a). Thus, this case creates no conflict needing resolution by this Court.

III. THE RESULT BELOW WAS CORRECT.

We suggested above that petitioner's true complaint is with the result of the Third Circuit's application of the *Kimbell Foods* factors, rather than with that court's analytical approach, which is beyond rebuke if its opinion is fairly read. Although the court's application of the settled *Kimbell Foods* test to the particular facts of this case would not warrant review here in any event, the Third Circuit's correct application is further reason for denying certiorari.

The *Kimbell Foods* test asks first whether a uniform federal rule is warranted. On that score the Third Circuit rightly pointed out:

> The refunds at issue are created by an order of FERC. Their purpose is to compensate customers who have been charged excessive rates for natural gas. Private parties may not alter the refund orders by contract or otherwise. Indeed, the very purpose of the NGA is to supersede private contractual arrangements that interfere with the federal objective of ensuring that pipelines charge only reasonable rates. Because the refunds arise directly from federal law and implement the central objective of the NGA,

> the property rights Columbia has in these customer refunds should not be subject to the vagaries of state trust law.

(Pet. App. 48a-49a). The court then addressed the second test, correctly ruling that "applying state law to determine Columbia's property rights in the refunds would frustrate the NGA's central purpose, to provide natural gas to the public at reasonable rates." (*Id.* at 49a). Finally, the Third Circuit recognized that the third test was satisfied as well, since "applying federal law will not upset commercial expectations that state law would govern." (*Id.* at 50a).

Recognizing that the state law rule it champions would interfere with FERC's order and the NGA goal of getting the refunds into the hands of the gas consuming public, the petitioner does not seriously challenge the court of appeals' resolution of the first two *Kimbell Foods* tests.[8] Instead petitioner focuses on the third consideration and contends that the decision below has upset commercial expectations and will frustrate and confuse creditors of federally regulated entities. (Pet. 17-18). That contention is unrealistic. No creditor predicated its financial dealings with Columbia on the hope, let alone a legitimate expectation, that in the event of Columbia's bankruptcy its claims could be satisfied out of FERC-ordered refunds which coincidentally happened to be passing through Columbia as a conduit on the way to the gas consuming public. It is equally unlikely that creditors of other federal regulated entities will be disabled from making sound credit decisions—leading to "a drastic and negative effect on the credit market for (those) entities" (Pet. 18)—unless they can be certain that funds temporarily held by those entities for the benefit of others, under order of a

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[8] The petitioner's complaint that the Third Circuit's approach was "result-oriented" (Pet. 7, 14) is unwarranted: *Kimbell Foods* itself is result-oriented to the extent that it requires that federal law apply if state law would frustrate specific federal objectives.

federal regulatory agency, will be counted as the entity's available assets in the event of bankruptcy.

Finally, this Court has twice noted the importance of "prevent[ing] a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.' " *Butner*, 440 U.S. at 55, quoting *Lewis v. Manufacturers National Bank of Detroit*, 364 U.S. 603, 609 (1961). Yet the petitioner's view if adopted would allow the creditors to receive a windfall simply because of the happenstance of Columbia's bankruptcy when the refunds were passing through its hands. The Third Circuit correctly avoided that result.[9]

In short, the decision below adhered closely to this Court's precedents, creates no conflict with the decision of any other circuit, and was decided correctly.[10]

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[9] The Third Circuit's result is further supported by the legislative history of § 541(d), which evidences Congress' intent "that when a debtor is a mere conduit for funds to travel from one party to another, it lacks an equitable interest in the monies." (Pet. App. 57a). *Accord, T&B Scottsdale Contractors, Inc. v. United States*, 866 F.2d 1372, 1376 (11th Cir.), *cert. denied*, 493 U.S. 846 (1989).

[10] We are authorized to state that Columbia and its parent corporation, Columbia Gas System, Inc., join in this brief and the positions stated herein. Columbia is the wholly-owned subsidiary of Columbia Gas System, Inc., which is a publicly traded company. Neither Columbia nor Columbia Gas System, Inc. has any subsidiaries that are not wholly owned, except that Columbia Gas System, Inc. owns 90.8% of Columbia LNG Corporation. The remainder of Columbia LNG Corporation is owned by Shell LNG Company.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LESLIE A. NICHOLSON, JR.*
ROGER M. WHELAN
MICHAEL L. STERN
MARK H. BERMAN
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

WILLIAM F. SHEEHAN
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

Counsel for Respondent

December 17, 1993

* Counsel of Record

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No. 93-695

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

David B. Kearney
Assistant City Attorney
City Attorney's Office
900 East Broad Street
Room 300
Richmond, Virginia 23219
(804)780-7952

Counsel for Respondent
City of Richmond, Virginia

Stanley W. Balis *
Thomas C. Gorak
Kathryn A. O'Brien
Miller, Balis & O'Neil, P.C.
1140 Nineteenth Street, N.W.
Suite 700
Washington, D.C. 20036
(202)296-2960

Counsel for Respondents
Cities of Charlottesville, and
Richmond, Virginia

* *Counsel of Record*

December 17, 1993

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

QUESTION PRESENTED

Whether consumers of natural gas that are entitled to protection from unjust and unreasonable rates under a pervasive scheme of federal regulation embodied in the Natural Gas Act should be deprived of millions of dollars in refunds as a result of using state rather than federal common law under the Bankruptcy Code to determine their interest in these federally mandated refunds.

LIST OF PARTIES AND RULE 29.1 LIST

The caption of the decision below, reprinted in Appendix A to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit of the Official Committee of Unsecured Creditors of Columbia Gas Transmission Corporation, contains the names of the parties. The Cities of Charlottesville and Richmond, Virginia, own and operate the gas distribution systems serving their respective communities. Neither gas distribution system has a parent or subsidiary company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 29.1 LIST	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
1. *The Federal Interest In The Refunds At Issue*	5
2. *The Bankruptcy Code*	9
3. *The Decisions Below*	11
SUMMARY OF OPPOSITION	11
REASONS FOR DENYING THE PETITION	12
1. *The Third Circuit's Decision Properly Applies Federal Common* Law *To The Unique Facts And Circumstances Of This Case*	14
2. *There Is No Split In The Circuits Concerning The Appropriate Law To Apply To This Debtor*	21
3. *Petitioner Has Failed To Identify An Issue Of Importance That Should Be Addressed By The Court*	23
CONCLUSION	27

TABLE OF AUTHORITIES

CASES	Page
Associated Gas Distributors v. FERC, 893 F.2d 349 (D.C. Cir. 1989), *cert. denied*, 498 U.S. 907 (1990)	7
Butner v. United States, 440 U.S. 48 (1979)	10, 18
FPC v. Hope Natural Gas Co. 320 U.S. 591 (1944)	9, 16
Hillsborough County v. Automated Medical Labs., Inc., 471 U.S. 707 (1985)	15
In re Farmers Markets, Inc., 792 F.2d 1400 (9th Cir. 1986)	14
In re Iowa R.R., 840 F.2d 535 (7th Cir. 1988) *cert. denied*, 488 U.S. 899 (1988)	21
In re Lehigh & New England Ry., 657 F.2d 570 (3rd Cir. 1981)	10, 21
In re Nejberger, 934 F.2d 1300 (3rd. Cir. 1991)	14
In re Penn Central Transp. Co., 486 F.2d 519 (3rd Cir. 1973) (en banc), *cert. denied*, 415 U.S. 990 (1974)	10, 15, 21
In re Roach, 824 F. 2d 1370 (3rd Cir. 1987)	18
In re United Milk Products Co., 261 F. Supp. 766 (N.D. Ill. 1966)	10, 15

CASES	Page
Mechanisms for Passthrough of Pipeline Take-or-Pay Buyout and Buydown Costs, 53 FERC (CCH) ¶ 61,163 (1990) ("Order No. 528"), *reh'g denied in part, granted in part*, Order No. 528-A, 54 FERC (CCH) ¶ 61,095 (1991), *reh'g denied*, Order No. 528-B, 55 FERC (CCH) ¶ 61,372 (1991)	8, 13
Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 52 Fed. Reg. 39,334, FERC Stats. & Regs. (CCH)¶ 30,761 (1987) ("Order No. 500"), *remanded, American Gas Ass'n v. FERC* 888 F.2d 136 (D.C. Cir. 1989)	6
Texas Eastern Trans. Corp., 39 FPC 630 (1968) *aff'd sub nom., Texas Eastern Transmission Corp. v. FPC*, 414 F.2d 344 (5th Cir. 1969), *cert. denied*, 398 U.S. 928 (1970)	13
Transamerican Natural Gas Corp., 41 FERC (CCH) ¶ 62,206 (1987)	24, 25
United States v. Kimbell Foods, Inc., 440 U.S. 715 (1975)	15, 16
STATUTES	
Bankruptcy Code, 11 U.S.C. § 101 *et seq.*	*passim*
Natural Gas Act, 15 U.S.C. § 717 *et seq.*	*passim*
28 U.S.C. Section 1254(1)	2
OTHER AUTHORITIES	
L. King, Collier on Bankruptcy (15th ed. 1993)	14

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v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The Cities of Charlottesville and Richmond, Virginia ("Cities"), Respondents in the captioned proceeding, hereby submit this Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit of the Official Committee of Unsecured Creditors of Columbia Gas Transmission Corporation ("Petitioner" or "Creditors Committee").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, reprinted in Petitioner's Appendix A, is reported at 997 F.2d 1039. The order of the United States Court of Appeals for the Third Circuit denying the Creditors Committee's Petition for Rehearing and Rehearing en banc is

reprinted in Petitioner's Appendix D. The opinion of the United States District Court for the District of Delaware, reprinted in Petitioner's Appendix B, is not reported. The opinion of the United States Bankruptcy Court for the District of Delaware, reprinted in Petitioner's Appendix C, is reported at 136 B.R. 930.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The judgment of the United States Court of Appeals for the Third Circuit was entered on July 6, 1993. The order of the United States Court of Appeals for the Third Circuit denying the Creditors Committee's Petition for Rehearing was entered on August 6, 1993. The Creditors Committee filed a Petition for a Writ of Certiorari ("Petition") on November 3, 1993. The Cities received the Petition on November 4, 1993. By letter order of William R. Suter, Clerk, dated November 22, 1993, all respondents were granted an extension of time within which to file a response to the Petition, up to and including December 17, 1993.

STATUTES INVOLVED

1. Section 541 of the Bankruptcy Code, 11 U.S.C. § 541, provides in pertinent part:

> (a) The commencement of a [bankruptcy case] . . . creates an estate. Such an estate is comprised of . . . all legal or equitable interests of the debtor in property as of the commencement of the case . . . .
>
> (d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate . . . only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

2. Section 4 of the Natural Gas Act ("NGA"), 15 U.S.C. § 717c, provides in pertinent part:

> (a) Just and reasonable rates and charges. All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.
>
> (e) Authority of Commission to hold hearings concerning new schedule of rates. . . . Where increased rates or charges [become effective pending the completion of a hearing], the Commission may, by order, require the natural-gas company . . . to refund any amounts ordered by the Commission . . . .

STATEMENT OF THE CASE

In 1938, Congress passed the Natural Gas Act ("NGA"). 15 U.S.C. §§ 717-717w. The NGA is "plainly designed to protect the consumer interests against exploitation at the hands of private natural gas companies." *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 612 (1944). Respondent Columbia Gas Transmission Corporation ("Debtor") is a natural gas company subject to extensive regulation under the NGA by the Federal Energy Regulatory Commission ("FERC" or "Commission"). On July 31, 1991, Debtor and its parent, The Columbia Gas System, Inc., filed petitions for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. Sections 1101-1174, in the United States Bankruptcy Court for the District of Delaware.

The question presented here is whether natural gas consumers that the NGA protects are entitled to refunds of millions of dollars in payments made pursuant to FERC orders later found to be unlawful under the NGA. Petitioner — ignoring the clear purpose of the NGA and the important federal interest at

stake — would deprive consumers of the protections provided by the NGA and instead relegate those consumers to the status of "ordinary creditors" under the Bankruptcy Code.

The Third Circuit carefully analyzed the NGA, the Bankruptcy Code, federal common law principles, and the facts, and held that Debtor did not have equitable title to these refunds. Accordingly, the Third Circuit concluded that these refunds are *excluded* from Debtor's bankruptcy estate under Section 541(d) of the Bankruptcy Code, 11 U.S.C. Section 541(d). 997 F.2d at 1062. The Third Circuit's decision is consistent with the consumer protection mandate of the NGA, the Bankruptcy Code, and federal common law principles established by this Court.[1] Petitioner's tortured attempts to discredit the sound reasoning and consistent application of federal law set forth in the Third Circuit's decision and to transform this case into a forum on the application of federal common law, coupled with its studious avoidance of the consumer protection principles of the NGA, warrant denial of its petition.[2]

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[1] In their Cross-Petition for a Writ of Certiorari filed December 3, 1993, the Cities argued that the disposition of the refunds should be governed by the NGA rather than federal common law principles, and that the NGA requires that all of the refunds be flowed through immediately to the customers. This was the analysis adopted by Third Circuit Judge Nygaard in his concurring and dissenting opinion (hereinafter "partial dissent"). The position taken by the Cities in their Cross-Petition does not undermine the Third Circuit majority's conclusion that if trust law governs the dispute over Debtor's interest in the refunds rather than the NGA, then federal common law applies.

[2] Petitioner repeatedly blurs the distinction between the customers of Debtor, which for these purposes are primarily local distribution company ("LDC") customers of Debtor, and the ultimate burner-tip consumers that the NGA is designed to protect. The ultimate burner-tip consumers are the residential, commercial, and other customers of the LDC customers of Debtor. As discussed herein and as the Third Circuit recognized, these consumers are not ordinary creditors for purposes of the Bankruptcy Code; Petitioner's attempt to cast them as such simply ignores over fifty years of regulation under the NGA.

1. *The Federal Interest In The Refunds At Issue.*

Under the NGA, FERC has authority to review and to modify or change rates that do not meet the NGA's just and reasonable standard. 15 U.S.C. § 717c(a). As part of this authority, FERC may allow proposed rates to go into effect subject to refund pending completion of its investigation into the justness and reasonableness of the proposed rate. 15 U.S.C. § 717c(e). The preliminary rates that go into effect pending FERC review and subject to refund are *not* final and do *not* meet the statutorily mandated "just and reasonable" standard. Only when FERC issues a final order concerning those rates, and any refunds of rates previously collected in excess of the just and reasonable level are made to the consumers that paid the unlawful rates, do the rates become final and lawful under the NGA.

FERC's power is not limited to reviewing proposed changes in rates or new rates; FERC may also review contractual terms, existing rates, and practices of companies subject to its jurisdiction. *See* 15 U.S.C. §§ 717c and 717d. As the Third Circuit correctly observed, "[i]f the Commission finds that any rate, contract or practice of a gas company is unjust, unreasonable, unduly discriminatory or preferential, it may determine the reasonable rate, contract term or practice and order the offending company to comply with its determination. *See* 15 U.S.C. § 717d(a)." 997 F.2d at 1052.

This brief summary of FERC's powers and duties underscores the pervasive nature of its regulation of the rates and services of interstate pipelines under the NGA. The refunds at issue here result from FERC's attempt to resolve the so-called "take-or-pay" problem through FERC Order Nos. 500 and 528.[3]

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[3] Approximately $161 million of the refunds at issue in the case relate to the take-or-pay claims. Other categories of refunds at issue include charges collected by Debtor to be turned over to the Gas Research Institute ("GRI") and to certain upstream pipelines of Debtor. This Brief in Opposition focuses solely on the refunds due to Debtor's customers as a result of the take-or-pay

Pipelines such as Debtor entered into long-term contracts with natural gas producers in the late 1970s and early 1980s that required the pipeline to "take" a certain quantity of gas or to "pay" for that quantity even if it actually took less. As the Third Circuit observed:

> By 1987, an oversupply of natural gas significantly decreased market prices, and pipeline customers had little incentive to purchase gas from pipelines at prices sufficient to allow the pipelines to cover the cost of gas they agreed to pay in their take-or-pay contracts. As a result, pipelines' gas sales declined, and the pipelines faced billions of dollars in accrued and future take-or-pay liability.

Id.

FERC's initial response to the take-or-pay problem, as set forth in its Order No. 500, was to permit pipelines to buy out or buy down their take-or-pay contracts and to "equitably" allocate the costs of the buyouts and buydowns among pipelines, producers, and pipeline customers. *See Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 52 Fed. Reg. 39,334, FERC Stats. & Regs. (CCH) ¶ 30,761 (1987) ("Order No. 500"), *remanded, American Gas Ass'n v. FERC*, 888 F.2d 136 (D.C. Cir. 1989). If a pipeline was willing to absorb between twenty-five and fifty percent of these costs, it could "pass through" to its customers an equal portion of the costs through a fixed charge. *Id.* at 30,784-85. The fixed charge to be assessed to each pipeline customer was determined by way of the "purchase deficiency methodology" under which each pipeline customer was allocated a portion of these costs based on the decline in that customer's pipeline gas purchases over a relevant period. *Id.* at p. 30,785. In addition, pipelines were also allowed to recover in full from their LDC customers (and

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claims; the Third Circuit also found Debtor did not have an equitable interest in funds collected on behalf of GRI.

ultimately from the burner-tip consumers they serve) the take-or-pay costs allocated to them under the purchase deficiency methodology by their upstream pipeline-supplier(s). *Id.* at 30,791. Thus, under Order No. 500, customers such as the Cities were presented a direct bill for (1) a portion of the take-or-pay costs incurred directly by Debtor and (2) take-or-pay costs assessed to Debtor by its various upstream pipeline-suppliers.

The latter category of costs is at issue in this proceeding. Debtor was billed a certain amount by each of its upstream pipeline-suppliers, which it in turn billed to each of its customers, including the Cities. Each customer paid that amount to Debtor, which simply turned it over to the upstream suppliers. Stated differently, Debtor acted as a conduit for payments by its customers to its upstream suppliers, merely passing through dollars paid by Debtor's customers to the upstream pipeline-suppliers and *vice versa*. These dollars, to which Debtor has no equitable right, claim, or entitlement, are the dollars that Petitioner incorrectly contends are part of the property of Debtor's estate.

The United States Court of Appeals for the District of Columbia Circuit struck down the FERC Order No. 500 purchase deficiency methodology for allocating costs among pipeline customers on the ground that it imposed a retroactive rate increase on certain of those customers in violation of the NGA. *Associated Gas Distributors v. FERC*, 893 F.2d 349 (D.C. Cir. 1989), *cert. denied*, 498 U.S. 907 (1990).[4] In response, FERC

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[4] Petitioner notes that the District of Columbia Circuit vacated the cost allocation mechanism "*not* because the charges were deemed excessive or unreasonable, but because this after-the-fact allocation violated the technical prohibition against 'retroactive ratemaking.'" Petition at 5 (emphasis in original) (citations omitted). Apparently, Petitioner is trying to distinguish the refunds ordered as a result of the *Associated Gas Distributors* case from refunds ordered when a rate is found to be excessive. This is a distinction without a difference. The fact that Order No. 500 was found to violate the prohibition against retroactive ratemaking goes to *why* it is excessive and

issued Order No. 528, which required pipelines to file new tariffs that allocate the take-or-pay charges to their customers pursuant to a different allocation method, and to refund the amounts customers were overcharged under the Order No. 500 purchase deficiency methodology. *See Mechanisms for Passthrough of Pipeline Take-or-Pay Buyout and Buydown Costs*, 53 FERC (CCH) ¶ 61,163 (1990) ("Order No. 528"), *reh'g denied in part, granted in part*, Order No. 528-A, 54 FERC (CCH) ¶ 61,095 (1991), *reh'g denied*, Order No. 528-B, 55 FERC (CCH) ¶ 61,372 (1991).

Pursuant to Order No. 528, five upstream pipelines that supplied gas to Debtor filed new rate schedules; the change in allocation methods used in these schedules resulted in $161 million in refunds to Debtor's customers to compensate for the amounts that its customers were overcharged under the Order No. 500 purchase deficiency methodology. Under the terms of Order No. 528 and its FERC Gas Tariff, Debtor again functions as a conduit and is *required* to pass these "take or pay" refunds through to its customers that paid the overcharges to Debtor. Order No. 528, 53 FERC at 61,596 ("all refunds must be paid by upstream and downstream pipelines to the customers that actually paid the fixed charges").

Pursuant to FERC Order No. 500, when Debtor was presented a bill for these costs by its upstream pipeline-suppliers, it simply allocated those costs to its LDC customers, collected them, and turned them over to the upstream pipelines. Likewise, when the United States Court of Appeals for the District of Columbia Circuit reversed FERC Order No. 500, refunds from the upstream pipeline-suppliers were and are to be flowed through by Debtor to *the LDC customers that paid those costs*

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must be refunded under the NGA, not *whether* it is excessive. The NGA requires that rates be "just and reasonable" — a rate that violates the prohibition against retroactive ratemaking is unjust and unreasonable and is excessive as to those customers that were overcharged.

in the first place. Under the terms of the NGA, FERC Order Nos. 500 and 528, and Debtor's FERC Gas Tariff, Debtor had and has *no* equitable claim, title, or interest in either the payments or the refunds. As the Third Circuit held, under the federal common law of trusts, Order Nos. 500 and 528 created a constructive trust for these dollars for the benefit of Debtor's customers, and established Debtor (the conduit for the FERC-ordered payments and refunds) as trustee. 997 F.2d at 1059-62.

The payments and refunds at issue constitute a component of the rate paid by Debtor's customers and are thus subject to the NGA's mandate that rates be just and reasonable. If the refunds are not returned to Debtor's LDC customers on behalf of the consumers they serve, the rate paid by those customers will be unjust and unreasonable in direct contravention of the NGA, FERC Order Nos. 500 and 528, and Debtor's FERC Gas Tariff.[5] Debtor simply does not have any equitable title to the dollars at issue here; hence, under Section 541(d) of the Bankruptcy Code, these dollars should be returned to Debtor's LDC customers.

2. *The Bankruptcy Code.*

The Bankruptcy Code governs the priority of payment of claims against the property of a bankrupt. Where, as here, property is not part of the bankrupt's estate, that property is not

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[5] Petitioner asserts that "it is well established that Congress' purpose in enacting the NGA was limited to protecting gas consumers from *monopoly power*, not protecting gas distribution companies from the ordinary risks of bankruptcy . . . faced by all commercial entities." Petition at 16 (emphasis in original) (footnote omitted). Petitioner fails to mention that Congress' method for protecting gas consumers from that monopoly power was to ensure the availability of adequate supplies of natural gas at just and reasonable rates. *See, e.g., FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). This federal statutory purpose would be thwarted if refunds ordered by FERC as part of its authority to ensure that rates are just and reasonable were kept from customers because under a particular state's law the refunds do not meet the definition of a trust held on behalf of the customers.

subject to the priority payment scheme established by the Bankruptcy Code and may be dispensed without regard to the priority rights of both unsecured and secured creditors. 11 U.S.C. § 541(d). Under Section 541, "[p]roperty in which the debtor holds . . . only legal title and not an equitable interest . . . becomes property of the estate . . . only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." 11 U.S.C. §541(d). As demonstrated above, under the facts of this case, Debtor does not hold *any* equitable title in the refunds of take-or-pay charges.

Petitioner argues for a narrow and unsupportable view of Section 541(d), contending that only property meeting the definition of a trust under state law qualifies for the exemption of property from a debtor's estate. Petitioner's view is contrary to both (1) Section 541(d) itself, which addresses legal and equitable title in general and does not directly address the trust issue, and (2) a long line of precedents that have applied the federal common law of trusts to the determination of property interests of a bankrupt when there is a strong federal interest at stake. *See, e.g., In re Lehigh & New England Ry.*, 657 F.2d 570 (3rd Cir. 1981) and *In re Penn Central Transp. Co.*, 486 F.2d 519 (3rd Cir. 1973) (en banc), *cert. denied*, 415 U.S. 990 (1974) (extensive federal regulation of interline railroad system justified applying federal law); *In re United Milk Products Co.*, 261 F. Supp. 766 (N.D. Ill. 1966) (government's interest in federally administered milk price support program called for application of federal law); *see also Butner v. United States*, 440 U.S. 48, 55 (1979) ("federal interest" can require the application of federal law to the determination of property interests).

The federal interest in this case is remarkably clear. Consumers are entitled to protection from unjust and unreasonable rates under the NGA; the failure to return the dollars at issue

here clearly would violate that interest. Thus, the federal common law should be applied to determine whether a trust exists.

3. *The Decisions Below.*

The Bankruptcy Court correctly applied the federal common law of trusts and found that the customer refunds were held in trust by Debtor for its customers. Thus, because these refunds are not part of Debtor's estate, they must be flowed through to Debtor's customers without regard for the priority rights of Debtor's creditors. The United States District Court for the District of Delaware incorrectly reversed the Bankruptcy Court's finding and instead applied state common law, concluding that no trust existed between Debtor and its customers with respect to the refunds. The Third Circuit reversed the District Court, agreeing with the Bankruptcy Court that federal common law should determine the existence of a trust and that under federal common law the customer refunds are held in trust by Debtor for its customers.

SUMMARY OF OPPOSITION

Despite the existence of a pervasive scheme of federal regulation under the NGA, despite the fact that Debtor acted as a mere conduit, passing payments and refunds between upstream pipeline suppliers and Debtor's LDC customers, and despite the Third Circuit's well-reasoned decision and attention to the particular facts of this case, Petitioner challenges the Third Circuit's holding that federal law governs the disposition of the refunds.[6] This Court should deny Petitioner's request for a writ

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[6] Petitioner cites the concurring and dissenting opinion's observation that "'nothing indicates one way or the other whether the parties intended to create a trust' and '[n]one of the traditional indicia of a trust relationship . . . [was] present.'" Petition at 7 (*quoting* 997 F.2d at 1064 (Nygaard J., concurring and dissenting)). Petitioner's citation to the partial dissent to support its position is disingenuous. The partial dissent does *not* support Petitioner's position at all; instead, that opinion found that *all* of the refunds at issue here (both pre- and post- petition) should be returned to Debtor's customers

of certiorari because Petitioner has (1) failed to demonstrate that the Third Circuit incorrectly applied federal common law to a situation involving an important federal interest, *i.e.*, the protection of consumers under the NGA; (2) failed to identify any *bona fide* conflict in the decisions of various circuits that would affect the outcome of this case; and (3) failed to demonstrate that an important issue is at stake in this proceeding that requires review by this court.

REASONS FOR DENYING THE PETITION

Petitioner frames the issue presented in this case as:

> Whether Congress has authorized federal courts in making property rights determinations concerning federally-regulated bankrupts to preempt the established state trust and property law called for by the Bankruptcy Code in favor of newly-created federal common law designed to further generalized policy interests unrelated to bankruptcy.

Petitioner has mischaracterized the issue in this case and misrepresented the holding of the Third Circuit as well as prior decisions of this Court and other federal courts.

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because, under the NGA, Debtor has no equitable interest whatsoever in these refunds. 997 F.2d at 1065-66 (Nygaard, J., concurring and dissenting) ("[The refunds] were ordered by a federal agency empowered by Congress; they must be passed through to the customers lest the holder violate the law; therefore, they belong solely to the customers under federal law."). That opinion reasoned that trust law, whether state or federal, is therefore irrelevant to the disposition of the refunds. *Id.* at 1064 (Nygaard, J., concurring and dissenting) ("[W]e should not apply traditional trust law in an area that is clearly unsuited for its application."). As noted *supra*, n.1, the Cities agree with the partial dissent that the NGA should determine Debtor's interest in the refunds. Nonetheless, if trust law governs the dispute, the Third Circuit majority is correct that federal common law must be applied.

Petitioner argues that the Third Circuit's decision goes beyond established precedents and creates a new rule of federal common law that threatens to undermine the policies furthered by the Bankruptcy Code. To the contrary, however, the decision below faithfully applies the federal common law jurisprudence of this Court and the established precedents concerning the application of the federal common law of trusts to the narrow question of whether customer refunds ordered by FERC pursuant to its authority under the NGA and merely flowed through by Debtor to those customers constitute part of Debtor's estate under the Bankruptcy Code.

At the outset, Petitioner's arguments should be rejected because Petitioner simply misconstrues the Bankruptcy Code. Had Debtor not declared bankruptcy, then Debtor would have had no equitable claim to these refunds. Under the NGA, the refunds belong to the customers and Debtor has no equitable interest in them. FERC and its predecessor, the Federal Power Commission ("FPC"), have consistently refused to allow pipelines to assert any claims against upstream pipeline-supplier refunds in their possession. *See, e.g.*, Order No. 528, 53 FERC at p. 61,596 ("all refunds must be paid by upstream and downstream pipelines to the customers that actually paid the fixed charges"); *Texas Eastern Trans. Corp.*, 39 FPC 630, 637-38 (1968) (holding that under the NGA "the ultimate consumers of natural gas are proper beneficiaries" of refunds from gas suppliers and that an interstate pipeline "has no legal right thereto"), *aff'd sub nom., Texas Eastern Transmission Corp. v. FPC*, 414 F.2d 344 (5th Cir. 1969), *cert. denied*, 398 U.S. 928 (1970). Since the refunds were ordered to remedy a rate found to be in violation of the NGA, they belong to the customers that paid the unlawful rate in the first place.

Despite this clear precedent, Petitioner argues that Debtor acquired some sort of equitable interest in the refunds as a result of its bankruptcy. That conclusion cannot be correct because

the Bankruptcy Code does *not* create any substantive property rights, it only creates a set of procedures for dealing with Debtor's property. *See, e.g., In re Nejberger*, 934 F.2d 1300, 1302 (3rd. Cir. 1991); *In re Farmers Markets, Inc.*, 792 F.2d 1400 (9th Cir. 1986); *L. King, Collier on Bankruptcy*, ¶ 541.02[1] (15th ed. 1993) ("Section 541 of the Code . . . provides a system for dealing with the debtor's interest in property and his debts. However, the existence and nature of the debtor's interest in property, and of his debts, are determined by non-bankruptcy law."); *see also*, 997 F.2d 1066 (Nygaard, J., dissenting and concurring). Petitioner seeks access to property to which Debtor would not be entitled had it not filed for bankruptcy, thereby arguing that the Bankruptcy Code has somehow created a new substantive property right. This is flatly contrary to the policy behind the Bankruptcy Code. For this reason alone, the Petition should be rejected.

Petitioner essentially advances three arguments in support of its Petition: (1) the Third Circuit's decision goes beyond established precedents of this Court concerning when federal common law should be applied; (2) there is a split in the circuits concerning the treatment of claims against federally regulated bankrupts; and (3) the issue in this case is of great importance. Even a cursory analysis of the facts, the NGA, the Bankruptcy Code, the relevant precedents, and the Third Circuit's decision demonstrates that none of these arguments is meritorious and that the writ therefore should be denied.

1. *The Third Circuit's Decision Properly Applies Federal Common Law To The Unique Facts And Circumstances Of This Case.*

Petitioner asserts that the decision of the Third Circuit "goes well beyond the narrow grounds under which this Court previously has permitted the creation of federal common law." Petition at 14. To the contrary, the Third Circuit's decision

faithfully applies the precedents of this Court. Moreover, those precedents compel the conclusion reached by the court below.

Contrary to Petitioner's assertions, the court below did not apply "newly-created federal common law." Petition at (i). Rather, the Third Circuit applied the federal common law of trusts as applied in a long line of precedents. *See, e.g., In re Penn Central Transp. Co.*, 486 F.2d 519 (3rd Cir. 1973) (en banc) *cert. denied*, 415 U.S. 990 (1974); *In re United Milk Products Co.*, 261 F. Supp. 766 (N.D. Ill. 1966). As the Third Circuit observed, "this court already has developed federal common law concerning trusts. Therefore, our decision to apply federal common law will not require us to announce new doctrines of substantive law unforeseen by the parties." 997 F. 2d at 1056 (citations omitted).

Despite this clear conclusion, Petitioner argues that the Third Circuit's decision is "inconsistent with" prior decisions of this Court limiting the scope of federal common law, cautioning courts applying federal common law to incorporate state law where possible, and refusing to apply federal common law "'unless that was the clear and manifest purpose of Congress." Petition at 9 (*quoting Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 715 (1985) (citations omitted)). According to Petitioner, the Third Circuit went beyond Supreme Court federal common law jurisprudence by "sanction[ing] federal common law preemption on nothing more than an unsupported inference that Congress (and the FERC), *had they considered the issue*, would have excused state-regulated gas distribution companies from the traditional principles of property and trust law that govern all other creditors' relationships with bankrupt gas pipelines." Petition at 15 (emphasis in original). Petitioner's characterization of the Third Circuit's holding bears no resemblance to reality.

In *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1975), this Court established a three step analysis to determine

whether federal or state law should supply the rule of decision under a federal statute when Congress has been silent on the issue. The *Kimbell Foods* analysis requires that courts consider the following in determining whether to apply federal common law: (1) the need for a nationally uniform law; (2) whether applying state law would frustrate specific objectives of the federal statute at issue; and (3) the extent to which application of a federal rule would upset commercial expectations that state law would govern. *Id.* at 728-29. A proper application of the *Kimbell Foods* analysis to the particular facts and circumstances of this case, assuming that trust theory is applicable, leads to the conclusion that given the existence of the NGA, federal common law governs the determination of Debtor's property rights in the FERC-ordered refunds at issue in this case.

The Third Circuit adopted the *Kimbell Foods* analysis and painstakingly applied it to the facts and circumstances of this case. 997 F. 2d at 1055. The Third Circuit first found that a national uniform law with respect to the treatment of FERC-ordered customer refunds is necessary "[b]ecause the refunds arise directly from federal law and implement the central objective of the NGA." *Id.* As discussed above, Congress intended, and this Court has recognized, that the NGA would provide uniform regulation of interstate pipelines at the federal level to protect consumers by ensuring that those consumers pay just, reasonable, and non-discriminatory rates. *See, e.g., FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 612 (1944).

The Third Circuit further found that the disposition of the refunds "should not be subject to the vagaries of state trust law." *Id.* (citations omitted). Again, the Third Circuit is on solid ground; Debtor operates in a number of different states, including, *inter alia*, West Virginia, Virginia, Maryland, Delaware, Pennsylvania, Ohio, Kentucky, and New York. Each of those states has individual trust laws that were not designed to address the disposition of refunds under the NGA. If not treated uni-

formly under federal common law, the question of whether refunds are the property of consumers that the NGA protects might be decided differently depending on which state law applies.

Moreover, as the Third Circuit also found:

> Trust law in numerous states imposes a constructive trust on funds only if wrongdoing has resulted in unjust enrichment . . . . Absent an express trust or affirmative wrongdoing, state law would not hold the refunds in trust on behalf of Columbia's customers. . . . Federal common law imposes a trust when an entity acts as a conduit, collecting the money from one source and forwarding it to its intended recipient.

Id. at 1056 (citations omitted). This is the essence of the instant case. Petitioner has all but ignored the NGA and the comprehensive regulation of Debtor's activities pursuant to that statute, and would have this Court believe that Debtor's customers are nothing more than ordinary creditors, buying and selling goods and services from and to Debtor. Petitioner is wrong. For the reasons set forth above, the Third Circuit's conclusion that uniform national treatment of these refunds is required is unassailable.

The Third Circuit next concluded that applying state law in this case "would frustrate the NGA's central purpose, to provide natural gas to the public at reasonable rates." 997 F.2d at 1056 (citations omitted). As explained above, while entitled to protection from unlawful rates under the NGA's scheme, customers have no choice but to pay certain rates *subject to refund in the event that those rates are found to be unlawful under the NGA*. That is precisely what occurred here; Debtor's customers were required to pay take-or-pay costs to Debtor's upstream pipeline-suppliers. Later, those rates were found to be unlawful by the United States Court of Appeals for the District

of Columbia Circuit; hence they *must* be returned to customers under the NGA. Any other result simply renders the NGA — and the consumer protections contained therein — a nullity. Given this, Petitioner's argument that "[a]t bottom, *no* substantial federal interest is furthered by abandoning established state law trust principles here," Petition at p. 19 (emphasis in original), is simply incomprehensible.

Nothing in the language of Section 541(d) of the Bankruptcy Code requires the application of state law to determine property interests. By its terms, Section 541(d) exempts "[p]roperty in which the debtor holds . . . only legal title and not an equitable interest." 11 U.S.C. Section 541(d). While state law *generally* governs property determinations under Section 541(d), there are circumstances which call for the application of federal law to determine the property interests of a bankrupt. *See, e.g., In re Roach*, 824 F. 2d 1370, 1374 (3rd Cir. 1987) (*quoting Butner v. United States*, 440 U.S. 48, 57 (1979)) ("[A]bsent a countervailing federal interest, 'the basic federal rule is that state law governs.'") The facts and circumstances of this case, which involves pervasive federal regulation of Debtor under the NGA by FERC, call for the application of federal law to determine the property interests of Debtor in these refunds. Application of state law would deprive consumers of the very protections that the NGA was designed to provide them.

Finally, the Third Circuit found that applying federal common law would not upset commercial expectations that state law would govern, because "[c]reditors cannot reasonably assume that state law will allocate various parties' interests in federally created property rights." 997 F.2d at 1056. Again, the Third Circuit is on solid ground. As discussed above, Debtor's customers are entitled to these refunds under the NGA; in the absence of the NGA, these rights would not exist, just as Debtor's responsibility to collect the payments and to funnel them to upstream pipeline-suppliers in the first place would not

have existed. Petitioners and other creditors are or should be aware that Debtor's activities are regulated under the NGA by FERC.

In short, contrary to Petitioner's assertion, the Third Circuit did not rely on an "unsupported inference" that had Congress considered this issue, it would have exempted bankrupt natural gas companies from application of state trust law. Congress' clear and unequivocal intent in enacting the NGA was to protect natural gas consumers by requiring that rates be just and reasonable, as both this Court and the Third Circuit have recognized. The Third Circuit correctly found that this purpose would be frustrated if customer refunds ordered by FERC to remedy an unjust and unreasonable rate were withheld from customers:

> If FERC intended that [Debtor] act as a conduit for the refunds to reach the public, but state law would not create a trust, FERC's objective of ensuring that exploited customers receive the full amount of their refunds would be subverted by state law. Application of the federal common law rule is necessary to prevent such an outcome.

Id.

Petitioner's only response — albeit both misleading and incorrect — to the conclusion that the NGA's consumer protection mandate would be thwarted by application of state trust law is that "it is gas distribution *corporations*, and *not* the gas-consuming public, that seek the disputed funds." Petition at 16, n. 17 (emphasis in original). As Petitioner knows, Debtor's LDC customers are required by their respective state regulatory commissions to return these refunds to their residential, commercial, and other customers. Moreover, as Petitioner also knows, both state consumer advocate offices and state public utility regulatory commissions of several states were parties to the case below, are respondents to this very petition, and represent the interests of these ultimate burner-tip consumers. These state

parties have fought vigorously for the return of these refunds to the LDCs, which in turn will return them to their customers.

Petitioner's claim that "*nothing* prevents the respondent state public utility commissions from ordering those large corporations to accept the consequences of their decisions to do business with Debtor and immediately refund to the gas-consuming public any amounts that those consumers were overcharged,"[7] Petition at 16, n. 17 (emphasis in original), is disingenuous. Petitioner is or should be aware that prior to November 1, 1993, Debtor's LDC customers had little choice but to purchase some or all of their gas from Debtor.[8] Thus, the "decision to do business with the debtor" was not solely within an LDC's control; Debtor had a monopoly, and LDCs were required to do all or part of their business with Debtor.

As stated by the Third Circuit, "the very purpose of the NGA is to supersede private contractual arrangements that interfere with the federal objective of ensuring that pipelines charge only reasonable rates." 997 F.2d at 1055. As discussed above, LDC customers must rely on the NGA and FERC to protect them in their business transactions with Debtor. Debtor's customers were *required* to pay the take-or-pay surcharges initially accepted by FERC under the NGA. Now that those surcharges have been found to be unjust and unreasonable,

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[7] Petitioner's characterization of Debtor's customers as "large corporations" is a weak attempt to divert the Court's attention from the consumer protection issues at stake. The refund dollars at issue here were paid by the gas consuming public, and the purpose of the refunds ordered by FERC is to return those dollars above the just and reasonable rate level to the gas consuming public. Moreover, not all of Debtor's customers are large corporations. Some of Debtor's customers are small gas distribution systems and some, like the Cities, are publicly owned systems.

[8] For some of the distributors, such as Respondent City of Charlottesville, Debtor is the *only* interstate natural gas pipeline that serves their community, and for other distributors, such as Respondent City of Richmond, Debtor is the major pipeline that serves their community.

it is unfair — not to mention unlawful — to find, as Petitioner argues, that those LDC customers and the consumers they serve are not entitled to the return of those unlawful overpayments because they supposedly should have known better than to deal with Debtor, even though Debtor was the only (or the primary) game in town. Petitioner's misguided attempt to compare Debtor's customers to other large corporations that operate in unregulated competitive markets only highlights the importance of considering the policy objectives of the NGA in determining property rights determinations under the Bankruptcy Code.

2. *There Is No Split In The Circuits Concerning The Appropriate Law To Apply To This Debtor.*

Petitioner contends that there is a split between the Third and Seventh Circuits concerning the treatment of claims against the estate of federally regulated bankrupt "interline" railroads. Petitioner asserts that (1) in *In re Lehigh & New England Ry.*, 657 F.2d 570 (3rd Cir. 1981), and *In re Penn Central Transp. Co.*, 486 F.2d 519 (3rd Cir. 1973) (en banc), *cert. denied*, 415 U.S. 990 (1974), the Third Circuit has established a rule with respect to claims against a bankrupt party subject to any federal regulation under which "federal law now will *always* preempt state law," Petition at 14 (emphasis in original), and (2) in *In re Iowa R.R.*, 840 F.2d 535 (7th Cir.), *cert. denied*, 488 U.S. 899 (1988), the Seventh Circuit has established a rule whereby "federal law will rarely, if ever, preempt state trust law," Petition at 14.

Contrary to Petitioner's assertion, *Penn Central*, *Lehigh*, and *In re Iowa* did not establish broad rules governing *all* claims against *any* federally-regulated bankrupt. Instead, each of these decisions addressed the narrow issue of how to treat the assets of bankrupt interline railroads and applied only to the narrow interline trust context. Petition at 13. While the Third and Seventh Circuits reached different conclusions with respect to this narrow issue, none of these decisions directly addressed the

issue in this case: whether FERC-ordered refunds made pursuant to the NGA are part of a debtor's estate under the Bankruptcy Code. As the Third Circuit explicitly found here, the facts in this case present a more compelling case for applying federal law than the interline railroad context, because "[t]here is an even greater federal interest in this case than in *Lehigh* . . . . The intricate system of accounts pipelines maintain to track refunds, the backbone of the federal scheme to regulate the gas industry, is mandated by federal law. In contrast, the railroads in *Lehigh* voluntarily adopted the interline balance system." 997 F.2d at 1057 (citation omitted). The Third Circuit's decision was limited to the particular facts of this case, facts that state a more compelling case for applying federal law than *Penn Central* or *Lehigh*. Thus, the Third Circuit's decision does *not* broaden the rules governing claims against a federally regulated bankrupt but rather is well within established precedents.

Assuming *arguendo* that the Third and Seventh Circuit decisions cited by Petitioner evidence a split in the interline railroad context, Petitioner has failed adequately to explain why this Court should grant certiorari now, when it has previously declined to review the issues presented in those cases. Although Petitioner claims that this "split" in the circuits is now ripe for review because "the [Third Circuit] court of appeals extended the application of federal trust law well beyond the narrow interline trust context," so that "[i]t is now available in all bankruptcies of federally regulated entities," Petition at 13, Petitioner provides no citation to the Third Circuit decision to support its interpretation of the court's holding. Nor could it. As discussed above, the Third Circuit carefully circumscribed its holding to the unique facts and circumstances of this case and made the required findings under *Kimbell Foods*.

The Third Circuit stated that while federal law governs questions involving the interpretation of a federal statute, "courts may either fashion a uniform federal common law rule

or adopt state law as the federal rule of decision." 997 F.2d at 1055. Applying this principle, the Third Circuit undertook a *Kimbell Foods* analysis of whether state or federal law should supply the rule of decision in this case. The Third Circuit's holding, accurately stated, is that it is appropriate to apply federal common law to the facts and circumstances of this case, *i.e.*, under the NGA, there is a sufficient interest to warrant the application of federal law. *Id.* Nowhere does the Third Circuit indicate that its holding should be applied in any other context, much less to *all* bankruptcies of entities that are in some way touched by federal regulation or *all* trust determinations pursuant to Section 541(d) of the Bankruptcy Code. The Third Circuit's decision is clearly limited to the facts and circumstances of this case and cannot be construed as a general rule of law applicable to all industries subject to some form of federal regulation.

3. *Petitioner Has Failed To Identify An Issue Of Importance That Should Be Addressed By The Court.*

Petitioner's final argument in support of its Petition is that the issue in this case is of "tremendous practical importance," Petition at 17, in light of the number of federally regulated industries. Petitioner claims that the decision below: (1) "has greatly upset established government and commercial expectations of pipeline creditors and others;" (2) will have a "dramatic" adverse impact on the Bankruptcy Code's "orderly process for the fair distribution of the bankrupt's assets;" and (3) "leaves *all* creditors of federally-regulated entities helpless to anticipate the extent of the assets that will be available in the event of bankruptcy." Petition at 17-18 (footnotes omitted) (emphasis in original).

Hyperbole aside, as already demonstrated above, Petitioner's fears are unfounded. *First*, rather than wreak havoc on the order the Bankruptcy Code strives to attain, application of federal trust law in this instance will do no violence to and is

consistent with the goals of the Bankruptcy Code. All parties, including each member of the Creditors Committee, are or should be aware of the nature of federal gas regulation under the NGA. A simple reading of the NGA leaves no doubt that a FERC-regulated pipeline is subject to pervasive federal regulation and has a refund obligation imposed by the NGA. In fact, contrary to Petitioner's assertion, withholding refunds from the customers to whom they belong would undermine the entire premise of the NGA, thereby wreaking havoc on the natural gas industry. Under Section 541(d) of the Bankruptcy Code, creditors have no reasonable expectation that they will have access to funds to which Debtor does not hold equitable title and which Debtor has no reasonable expectation of keeping. The Third Circuit's decision does no more than properly enforce Section 541(d) by recognizing that Debtor has no equitable interest in the refunds under the NGA.

Petitioner claims that the expectations of creditors and others will be upset because "[a]ll prior decisions by the FERC and the Third Circuit . . . indicated that a pipeline's refund obligations could only be classified as unsecured debt." *Id.* at 17 n. 18 (citations omitted). Neither *Penn Central* nor *Lehigh*, both cited by Petitioner, provide any support for this assertion. Those decisions do not even mention pipeline refunds required under the NGA.

Moreover, the only "FERC" decision cited by Petitioner to support its unsupportable proposition is a decision by FERC's Director of the Office of Pipeline and Producer Regulation, *Transamerican Natural Gas Corp.*, 41 FERC (CCH) ¶ 62,206 (1987) that was not even reviewed by the Commission. It is telling that Petitioner could not find a single decision by the Commission itself to support its contention about what "FERC's expressed policy has always been." Petition at 15 n.15. The Director's decision should be taken for what it is, a denial of a company's request that it be granted an extension of time and

not a treatise on bankruptcy law. While the Director mentioned bankruptcy law in passing, neither he nor the FERC has decided that NGA refunds are unsecured debt under the Bankruptcy Code. In fact, the Director concluded that "there is no conflict between the continuation of [the company's] refund obligation and its Chapter 11 status," and ordered the company to pay refunds owed to its customers. 41 FERC at 63,454. The Director simply suggested that the parties go to the bankruptcy court to obtain a determination of these interests, *id.*, which is precisely what Debtor did here. Thus, Petitioner has not cited a single instance in which FERC has held that a pipeline's refund obligations are unsecured debt under the Bankruptcy Code.

Second, rather than having a "dramatic" impact on the Bankruptcy Code's process for determining priorities, the Third Circuit's decision will have *no* impact on that process. The Third Circuit rejected this same argument when raised by Petitioner below, stating that "the Creditors Committee overlooks the dispositive question. The issue before us is whether the refunds are property of the bankruptcy estate. If the refunds are excluded from the bankruptcy estate, the priority scheme is not implicated because it only controls how to divide assets contained in the bankruptcy estate." 997 F.2d at 1058 n. 6.

Third, Petitioner is hardly left "helpless" by the Third Circuit's decision. Petitioner has many other assets to look to in order to satisfy its claims against Debtor. What Petitioner seeks here is unlawfully to increase the assets to which it may lay claim by ignoring the mandate of the NGA that consumers are to be protected. The Third Circuit's decision does not apply to all assets of Debtor; it is strictly limited to FERC-ordered customer refunds under the NGA (and GRI charges).

To be sure, there is an important interest in this case, an interest that the Third Circuit correctly recognized. That interest is to assure consumers that they will not be charged unlawful rates under the NGA. Refunds of unlawful rates are *not* the

property of Debtor; they belong to the consumers that were forced to pay the unlawful rates in the first place. Petitioner's arguments would undermine this long-standing federal regulatory scheme and should therefore be rejected, particularly in light of the fact that the Bankruptcy Code explicitly recognizes that creditors have no right whatsoever to property to which Debtor does not have equitable title.

CONCLUSION

Petitioner has mischaracterized the decision of the Third Circuit, misconstrued other relevant precedents, distorted the facts, and engaged in baseless assertions concerning the Third Circuit's opinion. As demonstrated above, the Third Circuit's decision properly was based on the federal common law jurisprudence of this Court and the prior decisions of other federal courts construing the federal common law of trusts, and is consistent with the policies furthered by the NGA and the Bankruptcy Code.

The Petition for a Writ of Certiorari therefore should be denied.

Respectfully submitted,

David B. Kearney
Assistant City Attorney
City Attorney's Office
900 East Broad Street
Room 300
Richmond, Virginia 23219
(804)780-7952

Counsel for Respondent
City of Richmond, Virginia

Stanley W. Balis *
Thomas C. Gorak
Kathryn A. O'Brien
Miller, Balis & O'Neil, P.C.
1140 Nineteenth Street, N.W.
Suite 700
Washington, D.C. 20036
(202)296-2960

Counsel for Respondents
Cities of Charlottesville, and
Richmond, Virginia

* *Counsel of Record*

December 17, 1993

No. 93-595

In The Supreme Court of the United States

OCTOBER TERM, 1993

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,

Petitioner,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et. al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT BRIEF IN OPPOSITION OF THE STATE PUBLIC UTILITY COMMISSIONS AND CONSUMER ADVOCATE OFFICES

ALAN KOHLER*
VERONICA A. SMITH
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 783-2810

Counsel for Pennsylvania Public Utility Commission

IRWIN A. POPOWSKY
DENISE GOULET
CRAIG BURGRAFF
1425 Strawberry Square
Harrisburg, PA 17120
(717) 783-5048

Counsel for Pennsylvania Office of Consumer Advocate

EVELYN ROBINSON-McGRIFF
MARGARET ANN SAMUELS
77 South High Street, 15th Floor
Columbus, OH 43266-0550
(614) 466-8574

Counsel for Office of Consumers' Counsel, State of Ohio

PAULA M. CARMODY
JOHN M. GLYNN
6 St. Paul Centre, Suite 2103
6 St. Paul Street
Baltimore, MD 21202
(410) 767-8150

Counsel for Maryland Office of Peoples' Counsel

DEBORAH VanDERVORT
700 Union Building
723 Kanawha Blvd. East
Charleston, WV 25301
(304) 558-0526

Counsel for Consumer Advocate Division, Public Service Commission of West Virginia

BEN BURKE HOWELL
TOBEY M. DALUZ
Reed, Smith, Shaw & McClay
2500 One Liberty Square
Philadelphia, PA 19103
(215) 851-8100

Counsel for Public Utilities Commission of Ohio

JAMES B. GAINER
DUANE W. LUCKEY
Lee Fisher, Attorney General of Ohio
150 E. Broad Street
Columbus, OH 43266-0572
(614) 644-4397

Counsel for Public Utilities Commission of Ohio

BRYAN G. MOORHOUSE
SUSAN MILLER
6 St. Paul Centre
6th Floor
6 St. Paul Street
Baltimore, MD 21202
(410) 767-8086

Counsel for the Maryland Public Service Commission

RICHARD SOLOMON
DAVID D'ALESSANDRO
Morrison & Hecker
1747 Pennsylvania Ave. N.W.
Washington, DC 20006-4604
(202) 466-6100

Counsel for the Public Service Commission of the State of New York

BEST AVAILABLE COPY

December 17, 1993

*Counsel of Record

QUESTIONS PRESENTED

1. Whether the Third Circuit's choice of law analysis addressing the application of the Bankruptcy Code and the Natural Gas Act to a bankrupt interstate natural gas pipeline is consistent with the decisions of this Court and other circuits?

2. Whether the Third Circuit's application of federal common law to the case before it created important and unresolved problems which would warrant this Court's review?

LIST OF PARTIES AND RULE 29.1 LIST

The caption of the decision below (Pet. App., 1a) contains the names of the parties. All of the State Public Utility Commission and Consumer Advocates joining in this cross-petition are governmental agencies and accordingly do not have parent companies or subsidiaries.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties and Rule 29.1 List	ii
Table of Authorities	iv
Opinion Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	2
Reasons why the Petition should be Denied	8
Conclusion	23

TABLE OF AUTHORITIES

CASES	Page
Adams v. Madison Realty & Dev. Inc., 937 F.2d 845, 856 (3d Cir. 1991)	14
Associated Gas Distributors v. Federal Energy Regulatory Commission, 893 F.2d 349 (D.C. Circuit 1989), *cert denied*, 111 S.Ct. 277 (1990)	5
Butner v. United States, 440 U.S. 48 (1979)	10, 11, 12
Clearfield Trust Co. v. United States, 378 U.S. 363 (1943)	9
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)	9
Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591, 612 (1944)	17
In re Ann Arbor Railroad, 623 F.2d 480 (6th Cir. 1980)	10, 12
In re Iowa Railroad, 840 F.2d 535 (7th Cir.) *cert. denied* 488 U.S. 707 (1988)	10, 12, 16, 18
In re Lehigh & New England Railroad, 657 F.2d 570 (3rd Cir. 1981)	10, 15
In re Penn Central Transportation Company, 486 F.2d 519 (3rd Cir. 1973) *cert. denied* 415 U.S. 990 (1974)	15, 16, 18
Kamen v. Kemper Financial Services, Inc., 111 S.Ct. 1711, 1717 (1991)	9
Milwaukee v. Illinois, 45 U.S. 304, 336 (1981)	13
Miree v. Dekalb County, 433 U.S. 25 (1977)	10

TABLE OF AUTHORITIES

CASES	Page
Missouri Pacific Railroad Company v. Esconola and Lake Superior Railroad Company, 897 F.d 210 (6th Cir. 1990).....	16
Northern Natural Gas Company v. State Corporation Commission of Kansas, 372 U.S. 84, 91-92 (1963).....	18
Schneidewind v. ANR Pipeline Company, 485 U.S. 293, 310 (1988)	18
T&B Scottsdale Contractors v. United States, 866 F.2d 1172 (11th Cir. 1989) ...	6
Texas Eastern Transmission Corporation v. Federal Power Commission, 414 F.2d 344, 346-347, 350 (5th Cir. 1968).....	4, 20
Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981)	10, 11, 12
United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979).....	9, 11
United States v. Little Lake Misere Land Company, Inc., 412 U.S. 580 (1973)	9
United States v. Texas, 113 S.Ct. 1631 (1993)	11
United States v. Yazell, 382 U.S. 341, 354 (1966)	13
West Virginia v. United States, 479 U.S. 305, 310 (1987).....	10, 12
STATUTES	
Natural Gas Act, 15 U.S.C.	
§717(a)	2, 3
§717c(a)	2, 3, 4, 18

TABLE OF AUTHORITIES

CASES	Page
§717c(e)	2, 3, 6
§717(e)	17
§3301	20
Bankruptcy Code, 11 U.S.C.	
§541(d)	2, 7, 8, 9, 10, 11
ADMINISTRATIVE ORDERS	
Columbia Gas Transmission Corporation, 54 FERC 61,002 (January 4, 1991)	5
Columbia Gas Transmission Corporation, 54 FERC 61,265 (March 8, 1991)	5
Columbia Gas Transmission Corporation, 55 FERC 61,203 (May 9, 1991)	5
Columbia Gas Transmission Corporation, 56 FERC 61,080 (July 19, 1991)	5
Columbia Gas Transmission Corporation, 56 FERC 61,157 (July 26, 1991)	5
Columbia Gas Transmission Corporation, 57 FERC 61,040 (October 8, 1991)	5
Transamerica Natural Gas Corporation, 41 FERC ¶62,206 (1987)	20
OTHER AUTHORITIES	
Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. Law Review 883, 950-953	10
Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. Law Review 383, 409-410	10
Mishkin, *The Variousness and Discretion of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U.Pa. Law Review 797, 802-803	10

No. 93-695

In The Supreme Court of the United States

OCTOBER TERM, 1993

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner,
v.
COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT BRIEF IN OPPOSITION OF THE STATE PUBLIC UTILITY COMMISSIONS AND CONSUMER ADVOCATE OFFICES

Joint Respondents, the Pennsylvania Public Utility Commission, Maryland Office of Peoples' Counsel, Pennsylvania Office of Consumer Advocate, Public Utilities Commission of Ohio, Office of Consumers Counsel, State of Ohio, Public Service Commission of the State of New York, Maryland Public Service Commission and Consumer Advocate Division, Public Service Commission of West Virginia (collectively referred to as the "State Agencies") file this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit filed by the Official Committee of Unsecured Creditors of Columbia Gas Transmission Corporation (petitioner or Creditors' Committee) in the above-captioned matter.

OPINION BELOW

The opinion of the court of appeals (Pet. App., 1a-74a) is reported at 997 F.2d 1034. The opinion of the district court (Pet. App., 75a-122a) is not reported. The opinion of the bankruptcy court (Pet. App., 123a-144a) is reported at 136 B.R. 930.

JURISDICTION

The statement of jurisdiction on page 2 of the petition is adopted. This brief in opposition is filed pursuant to Supreme Court Rule No. 15.2.

STATUTES INVOLVED

The citations of the statutes involved are listed below. The text of the statutes is included in the appendix to the State Agencies' cross-petition filed at 93-879.

Section 1 of the Natural Gas Act, 15 U.S.C. §717(a)
Section 4 of the Natural Gas Act, 15 U.S.C. §717c(a) and (e)
Section 541 of the Bankruptcy Code, 11 U.S.C. §541

STATEMENT OF THE CASE

1. *Bankruptcy Background.* On July 31, 1991, the Columbia Gas System, Inc. and its wholly-owned subsidiary, Columbia Gas Transmission Corporation (Columbia) filed voluntary petitions under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. Columbia Gas System, Inc. is a registered public utility holding company which owns and operates natural gas pipelines, natural gas producing companies and natural gas local distribution companies. Columbia is a major natural gas pipeline owned by Columbia Gas System, Inc. which provides natural gas sales and transportation services to customers in parts of eleven states and the District of Columbia. Columbia filed for bankruptcy relief primarily to address financial problems relating to high cost gas purchase contracts between Columbia and numerous gas producers, which had impeded Columbia's ability to sell gas to its gas distribution company customers including its own affiliates.

2. *Regulatory Background.* The refunds at issue here are a direct result of procedures established by the Natural Gas Act, 15 U.S.C. §717, *et seq.*, and utilized by the Federal Energy Regulatory Commission (FERC) to carry out the statutory mandate of ensuring that the gas consuming public pay only just and reasonable rates for natural gas. Section 4 of the Natural Gas Act, 15 U.S.C. §717c(e), sets out in great detail the process which the FERC must follow to approve the rates charged by interstate pipeline companies to their gas distribution customers. These statutory requirements set out a hearing process for FERC and interested parties to review rates filed by a pipeline company.

Section 717c(e) and FERC regulations and orders implementing the statute establish a regulatory system under which FERC routinely permits an interstate pipeline company's preliminary rates to go into effect and be initially charged to its gas distribution customers "subject to refund." After FERC's completion of its investigation, FERC routinely orders refunds, with interest, of any portion of a rate or charge which it determines to be unjust and unreasonable pursuant to its statutory mandate. 15 U.S.C. §717c(e).[1] As to Columbia, refunds ordered by FERC may result either from overcharges by upstream pipelines which must be flowed downstream, ultimately to gas consumers, or may result from overcharges by Columbia in its base rates.

A pipeline's preliminary rates authorized by FERC to become effective "subject to refund," are preliminary rates

[1] "[FERC is directed] upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified." 15 U.S.C. §717c(e).

and cannot be considered just and reasonable rates. It is only after FERC hearing and investigation and the routine ordering of refunds that a just and reasonable rate results. Any rate ultimately charged by a pipeline other than the "just and reasonable" rate is unlawful. 15 U.S.C. §717c(a). The FERC is only permitted to order refunds to cure unjust and unreasonable rates to the benefit of those who initially paid the rates, the gas consuming public. *Texas Eastern Transmission Corporation v. Federal Power Commission,* 414 F.2d 344 (5th Cir. 1968).

As to refunds passing downstream from upstream pipelines, when a pipeline receives any FERC ordered refund dollars, the pipeline must file tariff sheets with FERC to pass the refund dollars to its customers. Upon review of the tariff sheets, FERC approves or modifies the pipeline proposal and expressly orders the pipeline to "flow through" the refunds downstream. In its daily implementation of the Natural Gas Act, FERC has directed pipelines to "flow through" refunds on thousands of occasions.

Until such time as a pipeline complies with the FERC order and flows through the refunds, it must review, hold and account for the refunds consistent with the express and very specific requirements of the Natural Gas Act and FERC regulations, 18 C.F.R. Part 201. While, in some cases there are service contracts governing transactions between a pipeline and its upstream suppliers and downstream customers, the contracts must follow form service contracts approved by FERC, which contracts do not even mention refunds or the procedures for receiving, holding and accounting for the refunds. The only contractual provision which relates to refunds expressly obligates the contracting parties to comply with federal law, FERC regulations, FERC orders and FERC tariffs.

Once a pipeline complies with FERC orders and passes the refunds downstream to gas distribution customers the refunds fall within the province of state regulators, including public utility commissions joining in this brief, which monitor the flow through of the refunds to the ultimate beneficiaries, the gas consuming public. The regulation of the final steps of assuring just and reasonable rates to the public at the state level is equally applicable to gas distribution companies affiliated with upstream pipelines as it is to non-affiliated distribution companies.[2]

The regulatory procedures described above were and are directly applicable to the refunds which have been or will be received by Columbia. As to the refunds received pre-bankruptcy, in every case Columbia filed tariff sheets to pass the refunds downstream and in each case, was ordered by FERC to "flow through" the refunds, with interest, to its downstream gas distribution companies.[3]

3. *Proceedings below.* In *Associated Gas Distributors v. Federal Energy Regulatory Commission,* 893 F.2d 349 (D.C. Circuit 1989), *cert denied,* 111 S.Ct. 277 (1990), the District of Columbia Circuit revised the methodology for

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[2]There is no significance to the fact that some of the gas distribution companies which receive the refunds from Columbia are affiliated with Columbia. All gas distribution companies, regardless of their affiliation, are strictly regulated in their receipt and accounting for of the refunds and the pass through of the refunds to the gas consuming public by state regulators.

[3]*See,* for example, *Columbia Gas Transmission Corporation,* 54 FERC 61,003 (January 4, 1991); *Columbia Gas Transmission Corporation,* 54 FERC 61,265 (March 8, 1991); *Columbia Gas Transmission Corporation,* 55 FERC 61,203 (May 9, 1991); *Columbia Gas Transmission Corporation,* 56 FERC 61,080 (July 19, 1991); *Columbia Gas Transmission Corporation,* 56 FERC 61,157 (July 26, 1991); *Columbia Gas Transmission Corporation,* 57 FERC 61,040 (October 8, 1991).

allocating costs related to "take or pay" contracts applicable to all of the natural gas industry (Pet. App., 127a). As applied to Columbia, the implementation of the D.C. Circuit's decision through the issuance of FERC order No. 528 resulted in millions of dollars of overcharges to gas consumers served by Columbia. These overcharges originated with suppliers upstream from Columbia. Through many administrative orders, FERC implemented the D.C. Circuit decision and in doing so, cured unjust and unreasonable rates by ordering refunds under procedures governed by 15 U.S.C. §717c(e) as described above. These refunds constitute the majority of refunds at issue here.

On August 23, 1991, Columbia filed a motion with the bankruptcy court seeking permission to flow through the refunds to gas distribution customers to comply with FERC orders and FERC tariffs. In support of its motion, Columbia claimed that it did not have an equitable interest in the refunds.[4] The total refund obligation addressed by Columbia was approximately $160 million, of which approximately $21 million was received by Columbia pre-bankruptcy, the balance to be received post-petition.

The bankruptcy court granted Columbia's motion and held that applying federal common law, the refunds were held by Columbia in trust for its customers (Pet. App., 134a-136a). The district court reversed the bankruptcy

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[4]Contrary to the representation on page 5 of the petition, property which is expressly exempted from becoming part of the bankruptcy estate is not restricted to trust money but applies to any money for which the debtor does not hold an equitable interest. Section 541(d) of the Bankruptcy Code, 11 U.S.C. §541(d). This distinction is significant. *T&B Scottsdale Contractors v. United States*, 866 F.2d 1172 (11th Cir. 1989) citing H.R. Rep. No. 595, 95th Cong., 2nd Sess. (1977).

court and applied state law to reach its conclusion that the refunds were part of the bankrupt estate (Pet. App., 101a-104a).

The Third Circuit reversed the district court and after expressly discussing and applying this Court's precedent, held that under federal common law the refunds are not part of the bankrupt estate under 11 U.S.C. §541(d) (Pet. App., 63a). The Third Circuit concluded that all of the refunds received by Columbia after its bankruptcy filing should be passed on to Columbia's gas distribution customers without delay. The Third Circuit did apply the lowest intermediate balance test and concluded that pass through of the approximate $21 million in refunds and other trust funds received by Columbia pre-petition was restricted to Columbia's cash on hand at the time of bankruptcy (Pet. App., 67a). The State Agencies support the Third Circuit's decision to permit the pass through of the majority of the refunds at issue and dispute the decision to restrict the pass through of refunds received by Columbia prior to bankruptcy.[5]

In a separate opinion, Circuit Judge Nygaard concurred with the majority that the refunds were not part of the bankruptcy estate. However, the separate opinion dissented to the majority's application of the lowest intermediate balance test (Pet. App., 69a-74a).[6] As fully explained in its joint cross-petition for certiorari, the State Agencies wholly support the result and rationale advanced by Circuit Judge Nygaard.

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[5]On December 3, 1993, the State Agencies submitted a joint cross-petition for a writ of certiorari which was docketed by this Court at 63-879.

[6]Although as indicated on page 7 of the petition the Third Circuit's decision was reached by a divided panel, not one member of the panel supported the views or the result argued by the petitioner.

The United States government, through FERC, participated before the court of appeals as an *amicus curiae.* FERC made it clear that it had never intended that Columbia hold an equitable interest in FERC ordered "flow through" refunds (FERC brief, page 29). As FERC solicitor Jerome M. Feit recognized at oral argument before the court of appeals, FERC's position should come as no surprise to the participating producers, pipelines, distribution companies, and state agencies, alike. As Mr. Feit correctly stated, everyone in the industry knew that these refunds were held in trust by pipelines (Trans. of oral argument, page 27).

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Third Circuit's Choice of Law Analysis is Consistent With the Precedent established by this Court and Other Circuits.

The petition primarily bases its case for certiorari on an argument that the Third Circuit's choice of law analysis is inconsistent with the precedent established by this Court and cases decided by other circuits. The petitioner contends that certiorari should be granted for the following two reasons: (1) the Third Circuit's holding represents an unprecedented application of federal law to all cases involving interpretation of Section 541(d) of the Bankruptcy Code, 11 U.S.C. §541(d), and (2) the Third Circuit's decision applies federal common law and in doing so, fails to adopt state law trust principles as adopted by other circuits. As discussed below, both of these arguments lack merit. In fact, there is no disagreement among circuits regarding the choice between application of state or federal law to the facts of this case.

I.

The first reason promoted by the petitioner relates to a single sentence in the Third Circuit decision wherein the Court stated, "Therefore, it is clear, and the parties do not dispute, that federal law defines the parameters of section 541(d) of the Bankruptcy Code" (Pet. App., 47a). The petitioner asserts that this statement by the Court is not only inconsistent with the holdings of other circuits, but also is inconsistent with prior decisions of this Court. However, close review reveals that the Court's statement is correct and that no such inconsistency exists.

A federal court's choice between state and federal law has been consistently held to be governed by a two-prong test. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979); *United States v. Little Lake Misere Land Company, Inc.*, 412 U.S. 580 (1973); *Clearfield Trust Co. v. United States*, 378 U.S. 363 (1943). First, a court must determine whether the court has authority to apply federal law, or in the alternative, whether state law operates "of its own force." *Kimbell Foods* at 727. *Little Lake Misere* at 593. It is long been established that state law operates "of its own force" only in cases governed by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), which does not apply to matters which "arise in the context of a specific [federal] constitutional or statutory provision." *Little Lake Misere* at 592; *Kamen v. Kemper Financial Services, Inc.*, 111 S.Ct. 1711, 1717 (1991). These matters governed by federal law include disputes which relate to a nationwide federal program. *Kimbell Foods* at 726; *Little Lake Misere* at 593. That the federal statute does not specify the appropriate rule or decision in no way limits the use of federal law. Overall, federal courts are "to fill the interstices of federal legislation 'according to their own standards.'" *Kimbell Foods* quoting *Clearfield* at 367.

As will be discussed subsequently, if a court determines that a case is subject to federal law, it must then determine under the second prong whether state law should be adopted as the federal rule or whether federal common law should be established. *West Virginia v. United States,* 479 U.S. 305, 310 (1987); *Kamen* at 1717; *Kimbell Foods* at 727-728. Accordingly, consideration of the second prong substantively determines the choice of law issue between state and federal common law. If a court incorporates state law as the federal rule, the result is the same as if state law were applied "of its own force." *Kamen* at 1717; *Little Lake Misere* at 594.[7]

In reaching its conclusion that "federal law defines the parameters of section 541(d) of the Bankruptcy Code," the court of appeals was not substantively resolving the choice of law issue, it was merely considering the first prong of the consistently accepted choice of law standard (Pet. App., 47a). As the Third Circuit indicated in citing

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[7]The choice of law issue is actually resolved in the second prong. Some commentators have taken the view that express resolution of the first prong by a court is unnecessary since it has no substantive impact on which law is applied. *See, e.g.,* Field, *Sources of Law: The Scope of Federal Common Law,* 99 Harv. Law Review 883, 950-953; Friendly, *In Praise of Erie—and of the New Federal Common Law,* 39 N.Y.U. Law Review 383, 409-410; Mishkin, *The Variousness and Discretion of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision,* 105 U.Pa. Law Review 797, 802-803. Consistent with the view of these commentators, reviewing courts have often ignored any discussion of the first prong and moved directly to the second prong to resolve the choice of law issue. *See, e.g., Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630 (1981); *Butner v. United States,* 440 U.S. 48 (1979); *Miree v. Dekalb County,* 433 U.S. 25 (1977). This combining of the prongs is particularly true of lower court decisions concerning this choice of law issue. It also is generally true of all of the circuit court cases addressing the choice of law issue in the context of railroad bankruptcies, including those decisions by the Third Circuit. *See, e.g., In re Iowa Railroad,* 840 F.2d 535 (7th Cir.) *cert. denied* 488 U.S. 708 (1988); *In re Lehigh & New England Railroad,* 657 F.2d 570 (3rd Cir. 1981); *In re Ann Arbor Railroad,* 623 F.2d 480 (6th Cir. 1980).

Kamen, "It is axiomatic that federal law governs questions involving the interpretation of a federal statute" (Pet. App., 47a). Because the Bankruptcy Code is a federal statute, the Court properly concluded that federal law applied and therefore, that it was empowered to determine whether state law should be incorporated or whether federal common law should be applied.

As the Third Circuit stated after reaching its conclusion:

> This, however, is only the beginning of the inquiry. The determination that federal law applies does not inevitably require the application of a uniform federal rule. Applying federal law, courts may either fashion a uniform federal common law rule or adopt state law as the federal rule of decision. *See id; United States v. Kimbell Foods, Inc.,* 440 U.S. 715, 727-728, 99 S.Ct. 1448, 1458 (1979).

Pet. App., 47a-48a.

The Third Circuit's conclusion under the first prong that federal law governs all 11 U.S.C. §541(d) inquiries is in accordance with, and closely follows, the standard historically developed by this Court. Clearly it is not an unprecedented departure as described by the petitioner.[8] As the Third Circuit noted, the fact that this case arises under interpretation of a federal statute, the Bankruptcy Code, is clear and undisputed (Pet. App., 47a).[9]

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[8]The petitioner cites *United States v. Texas,* 113 S.Ct. 1631 (1993), *Texas Industries Inc.* and *Butner* for its contention that the Third Circuit's application of federal law to 11 U.S.C. §541(d) disputes is inconsistent with this Court's prior precedent. None of these cases supports the Petitioner's contention. The *Texas* case merely stands for the proposition that once federal courts establish and apply federal common law, a statute which follows the development of the

(footnote continued on next page)

Furthermore, the Third Circuit's resolution of the first prong is not inconsistent with the decisions of other circuits addressing interpretation of Section 541(d). The fact that the courts in *Iowa R.R.* and *Ann Arbor R.R.* omitted discussion of the first prong and moved directly to discussion of the choice between incorporated state law and federal common law does not result in inconsistent decisions. Both courts implicitly recognized their authority to address the choice between incorporated state law and federal common law, a choice which would be outside the court's power if state law had applied "of its own force." *Kimbell Foods* at 727. In this case, following the consistent and longstanding rule of this Court, the Third Circuit expressly addressed and correctly decided the issue of whether it had the power to address the choice of law prior to substantively resolving the issue through consideration of the second prong.

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federal common law must be interpreted consistent with the common law unless the statute speaks directly to the question addressed by the common law. Although it is not clear in the Court's opinion whether the common law in question was state or federal in origin, review of the justification for the Court's decision reveals that federal common law, not state common law, was at issue. *See West Virginia v. United States*, 479 U.S. 305, 310 (1987). Both the *Texas* and *West Virginia* decisions are expansive interepretations of the application of federal common law and support the State Agencies' position. As indicated previously, *Texas Industries* and *Butner* are cases which do not expressly address the first prong regarding whether federal law applies but move directly to the second prong to substantively resolve the choice of law issue. Accordingly, neither is inconsistent with the Third Circuit's conclusion regarding Section 541(d) disputes, which is merely a resolution of the first prong of the long-established standard.

[9]The State Agencies submit that the application of federal law under the first prong is even clearer in this case because the case arises under both the Bankruptcy Code and the Natural Gas Act and involves two federal programs.

II.

In addressing choice of law issues, once a federal court determines that federal law applies under the first prong, it must then determine whether state law should be incorporated or whether federal common law should be established and applied. *Kimbell Foods* at 727-728. When federal programs "by their nature are and must be uniform in character through the Nation," federal common law must supplant the adoption of state law as the federal rule. *Kimbell Foods* at 728, quoting *United States v. Yazell,* 382 U.S. 341, 354 (1966). No state law "may be applied which would not be wholly in accord with the federal program." *Little Lake Misere* at 604, quoting Mishkin, 105 U.Pa. Law Review at 805-806. The application of federal common law is appropriate when "a single nationwide rule would be preferable to one turning on state law, and the incorporation of state law would not give due regard to the federal interest" in implementing a Congressional statute. *West Virginia* at 310. The application of federal common law is appropriate when federally created substantive rights and obligations are at stake. *Milwaukee v. Illinois,* 45 U.S. 304, 336 (1981).

In addressing this issue, the Third Circuit closely followed the detailed standard expressly identified by the Court in *Kimbell Foods* in evaluating and determining the need for application of federal common law:

> In *Kimbell Foods,* the Supreme Court outlined the analysis that determines whether uniform federal common law or state law should apply. The determination depends on the nature and importance of the government interest at issue and the effect of applying state law. *Kimbell Foods,* 440 U.S. at 727-28, 99

> S.Ct. at 1458. To decide whether a national federal rule is necessary, courts should consider: (1) the need for a nationally uniform law; (2) whether incorporation of state law would frustrate specific objectives of the federal program at issue; and (3) the extent to which application of a federal common law rule would upset commercial expectations that state law would govern. *See id* at 728-29, 99 S.Ct. at 1458-59; *Adams v. Madison Realty & Dev. Inc.*, 937 F.2d 845, 856 (3d Cir. 1991). Developing a federal common law rule is the exception rather than the rule. Federal law should coincide with the relevant state law unless state law would undermine the objectives of the federal statutory scheme and there is a distinct need for nationwide legal standards. *See Kimbell Foods*, 440 U.S. at 728, 99 S.Ct. at 1458.

Pet. App., 48a.

The Third Circuit concluded that the property rights in refunds created by a federal agency, FERC, under express authority of the Natural Gas Act, to cure the unjust and unreasonable rates of a bankrupt interstate natural gas pipeline were governed by federal common law. The decision resulted from a very careful application of the *Kimbell Foods* standards to the unique facts before it. The facts before the Third Circuit, and now before this Court, are truly unprecedented. Never before in United States history has a FERC regulated interstate pipeline governed by the Natural Gas Act filed for bankruptcy. Considering this factor alone, the State Agencies believe that there can not be a conflict between circuits regarding the choice between federal common law and state law. No other circuit has ever reviewed, much less inconsistently

decided, the application of this Court's well-recognized standards to the need for uniformity to fulfill the objectives of the particular federal program at issue here.

The petitioner asserts that the Third Circuit's decision is inconsistent with railroad bankruptcy cases in the Seventh and Sixth Circuits and should be reviewed by this Court as a result. The petitioner's argument fails since these cases evaluate the choice of law issue as it relates to a completely different federal program with completely different needs for uniformity and objectives. In its most favorable light, the petitioner's argument can only stand for the proposition that in applying the choice of law standard in prior cases addressing bankrupt railroads subject to a federal program created by the Interstate Commerce Act, the Third Circuit reached a different result than another circuit with respect to application of the choice of law standard to the same federal railroad program. While these arguments might have been relevant to certiorari review in those cases, they clearly are not relevant here.[10]

Historically, in 1973 and 1981 respectively, the Third Circuit determined that federal common law applied to cases addressing the issue of whether funds collected and

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[10]Although the petitioner's arguments may have been relevant in the earlier railroad cases, they were not successful when made by past litigants. The petition relies primarily on *Iowa Railroad*, a Seventh Circuit decision creating an alleged inconsistency of application of choice of law standards with *Penn Central* and *Lehigh*, the prior Third Circuit railroad cases. Faced with this alleged conflict between circuits, this Court denied certiorari at 488 U.S. 899 (1988). On pages 13-14 of the petition, an attempt is made to explain this Court's decision not to resolve the alleged circuit split in 1988 and to show why circumstances have changed. However, the arguments cannot be considered convincing since the application of choice of law standards in this case is to a completely different federal program.

held by a bankrupt interline railroad for participating railroads were held in trust. *Penn Central; Lehigh.* In *Lehigh,* the Third Circuit expressly considered whether the application of federal common law was appropriate and after careful review of this Court's precedent determined that the need for uniformity and the objectives of the Interstate Commerce Act required application of federal common law.[11]

Subsequently in *Iowa Railroad,* in a case relied on heavily by petitioner, the Seventh Circuit addressed a similar situation concerning a railroad bankruptcy. Although the result reached by the Seventh Circuit to incorporate state law as the federal rule rather than apply federal common law was different, the standard applied to determine whether federal common law should apply is the same. Like the Third Circuit in *Lehigh,* the Seventh Circuit examined whether there was a need for uniformity and whether application of state law disturbed the objectives of the federal program under the Interstate Commerce Act.[12]

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[11]Although the petitioner appears to assert on pages 8-9 of its petition that the Third Circuit's railroad decisions are inconsistent with the Sixth Circuit's railroad decisions, it admits on page 12, f. 12 of its petition that the Sixth Circuit essentially adopted the *Lehigh* analysis in *Ann Arbor R.R.* Subsequently, in *Missouri Pacific Railroad Company v. Esconola and Lake Superior Railroad Company,* 897 F.2d 210 (6th Cir. 1990), the Sixth Circuit expressly adopted the Third Circuit's view.

[12]It is noteworthy that although the Seventh Circuit reached a different result in *Iowa Railroad* than the Third Circuit did in *Penn Central,* the Seventh Circuit did not reject *Penn Central* but expressly distinguished the case on the fact that the railroad in *Iowa Railroad* had not been participating in the national uniform accounting system like the railroad in *Penn Central.* Given the *Penn Central* facts, the Seventh Circuit would have decided the same as the Third Circuit. 540 F.2d at 544. Accordingly, the Sixth Circuit's conclusion in *Missouri Pacific* that the Seventh Circuit Court expressly intended to reject *Penn Central* is mistaken.

There is no inconsistency between the circuits in determination of the standard to be applied to resolve the choice of law issue. The fact that there may have been some disagreement between the circuits on the result of applying that standard to a federal program under the purview of the Interstate Commerce Act does not support certiorari here. As expressly recognized by the Third Circuit, there is an even greater federal interest in this case than in the railroad case (Pet. App., 51a-52a). Accordingly, the petitioner's argument cannot support its conclusion that the circuits are divided. Given the same facts and the same federal program established under the Natural Gas Act, there is no evidence that the Seventh Circuit would not conclude that the application of federal common law is appropriate.

While factual similarities between the railroad cases and this case can be identified, the facts of this case and the underlying federal program beg even more forcefully for application of federal common law. While in the railroad case, the fiscal obligations were established by generally accepted industry standards and did not involve the establishment of rates for service, in this case the refund obligations are established by FERC orders expressly issued to assure just and reasonable rates for natural gas. These orders are issued pursuant to express authority of 15 U.S.C. §717(e) and are in furtherance of, and are necessary to carry out, the just and reasonable rate doctrine, the primary Congressional objective of the Natural Gas Act. *Federal Power Commission v. Hope Natural Gas Company,* 320 U.S. 591, 612 (1944).

Unlike the railroad cases, gas pipelines are subject to orders of the FERC requiring them to "flow through" the refunds to gas distribution company customers, again in

furtherance of Congressional objectives. Like the railroad in *Penn Central,* but unlike the railroad in *Iowa R.R.*, the funds at issue are subject to uniform accounting procedures. However, unlike *Penn Central,* where the railroad's accounting procedures were governed by industry guidelines, here the accounting procedures followed by Columbia are mandated by federal law. 18 CFR, Parts 150-179. Finally, this Court has indicated that uniformity of regulation of the operations of interstate pipelines, the most important factor in the choice of law standard, is a Congressional objective of the federal program at issue here established under the Natural Gas Act. *Schneidewind v. ANR Pipeline Company,* 485 U.S. 293, 310 (1988); *Northern Natural Gas Company v. State Corporation Commission of Kansas,* 372 U.S. 84, 91-92 (1963).

The Third Circuit's decision below as to choice of law is correct. Incorporation of state trust law as the federal rule would result in Columbia charging illegal rates under 15 U.S.C. §717c(a), being in violation of FERC orders and would otherwise frustrate all of the objectives of the Natural Gas Act (Pet. App., 50a). Faced with these circumstances, it is clear that the Seventh Circuit, if given the opportunity, would also conclude that the application of federal common law is required and that under that law the refunds at issue are held in trust by Columbia. There is no inconsistency between the circuits. Indeed, there can be no inconsistency. No other circuit has had the opportunity to review the application of choice of law principles to the federal program established by the Natural Gas Act.

2. The Third Circuit's Application of Federal Common Law Does Not Create Important and Unresolved Problems.

The Third Circuit's application of federal common law and resulting holding that the refunds at issue are held in trust for Columbia's downstream customers does not create important or unresolved problems which would warrant this Court's review. The petitioner attempts to attract this Court's attention with unsupported statements that the commercial expectations of creditors of interstate pipelines would be upset by the application of federal common law, a view expressly rejected by the Third Circuit (Pet. App., 50a-51a).

The petitioner's theory presumes that lenders considered the availability of FERC-ordered refunds in the case of bankruptcy in evaluating credit arrangements with interstate gas pipelines including Columbia. This presumption is clearly not supportable. The service contracts between Columbia and its customers, the form of which must be approved by FERC, each contained express reference to the application and incorporation of FERC regulations and orders. All of the refunds received by interstate gas pipelines, like Columbia, are or will be subject to FERC orders which expressly direct the pipeline to "flow through" the refunds downstream. The service contracts, and FERC orders and regulations expressly adopted by the contracts, made it abundantly clear to any potential lender that it could not have reasonably relied on or expected that a pipeline had an equitable interest in refunds which could be asserted by creditors in the case of bankruptcy.[13]

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[13]The petitioner boldly states that "it is undisputed that there were no contractual expressions of intent to create a fiduciary trust relationship" (Pet., pages 5-6, f. 5). The State Agencies strongly disagree.

In fact, there were never any commercial expectations that FERC ordered refunds would be available to creditors in the case of a pipeline bankruptcy. The State Agencies submit that producers, pipelines, distribution companies and lenders were all well aware that FERC ordered refunds are and have always been the property of the gas consuming public for whose benefit they are created.[14] *Texas Eastern Transmission Corporation v. Federal Power Commission,* 414 F.2d 344, 346-347, 350 (5th Cir. 1968). Accordingly, these alleged commercial expectations are a product of the creative legal arguments of the petitioner, not commercial reality.

Nor does the fact that the Internal Revenue Service (IRS) has a tax claim against Columbia's bankruptcy estate constitute an important issue which warrants this Court's review (Pet., pages 10-11, f. 10). The United States, through the IRS, is a creditor in most bankruptcies. To adopt the petitioner's argument would require this Court to review every lower court decision which directly or indirectly affected the government's bankruptcy claim.

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[14]The petitioner argues that until FERC's amicus brief to the Third Circuit which expressed its position that neither Columbia or any other interstate gas pipeline had an equitable interest in FERC ordered refunds under the Natural Gas Act, FERC had historically viewed refunds as yielding unsecured claims in bankruptcy (Pet., pages 10-11 f. 10). This position is insupportable and is inconsistent with the thousands of FERC orders under the Natural Gas Act which require pipelines to "flow through" refunds downstream. The case cited by petitioner in support of its position, *Transamerica Natural Gas Corporation,* 41 FERC ¶62,206 (1987), is a case involving butane gas and involved refunds ordered by FERC under authority of the Natural Gas Policy Act, 15 U.S.C. §§3301, *et seq.* not the Natural Gas Act. The Natural Gas Policy Act addresses the pricing of gas production not gas transportation and distribution and is designed to achieve very different Congressional objectives. Furthermore, Transamerica is a producer and is at the beginning of the natural gas continuum. There is no entity upstream from Transamerica from whom it could receive refunds for the purpose of "flow through" to a downstream beneficiary.

Furthermore, in this case, the only position taken by the United States government before the Third Circuit was the amicus position of FERC which strongly supported the Third Circuit's application of federal common law to this case.

Finally, the petitioner attempts to convince this Court that the application of federal common law by the Third Circuit is inconsistent with the public interest because it will increase the cost of capital for interstate pipelines, costs which might ultimately be passed on to gas consumers. Again, this argument is based on the unsupported presumption that commercial expectations are so affected by the Third Circuit's decision that prospective lenders will increase interest rates to interstate pipelines. This presumption is also a self-serving creation of the petitioner and does not reflect commercial reality.

The State Agencies and FERC are the only parties to these proceedings which are qualified to assess the effect of the Third Circuit's decision on the public interest. In fact, the State Agencies appear before this Honorable Court pursuant to authority delegated by their respective state legislatures to protect the public interest.

The expectations of the State Agencies, as well as the expectations of our constituents, the gas consuming public, are to rely on the nationwide ratemaking system established by the Natural Gas Act. Those expectations and the requirements of the Act would be frustrated if the refunds at issue were not authorized to flow through Columbia, and subsequently through gas distribution companies regulated by state public utility commissions, to their rightful owners. If expectations are to be considered by this Court, they should be the expectations of those

consumers that rely on the government to enforce statutorily required just and reasonable rates for natural gas and not the alleged self-serving expectations of the corporations represented by the petitioner.

CONCLUSION

The State Agencies respectfully request this Honorable Court to deny certiorari in this matter.

Respectfully submitted,

PAULA M. CARMODY
JOHN M. GLYNN
6 St. Paul Centre, Suite 2102
6 St. Paul Street
Baltimore, MD 21202
(410) 767-8150

Counsel for Maryland Office of Peoples' Counsel

IRWIN A. POPOWSKY
DENISE GOULET
CRAIG BURGRAFF
1425 Strawberry Square
Harrisburg, PA 17120
(717) 783-5048

Counsel for Pennsylvania Office of Consumer Advocate

EVELYN ROBINSON-McGRIFF
MARGARET ANN SAMUELS
77 South High Street, 15th Floor
Columbus, OH 43266-0550
(614) 466-8574

Counsel for Office of Consumers' Counsel, State of Ohio

DEBORAH VanDERVORT
700 Union Building
723 Kanawha Blvd. East
Charleston, WV 25301
(304) 558-0526

Counsel for Consumer Advocate Division, Public Service Commission of West Virginia

BEN BURKE HOWELL
TOBEY M. DALUZ
Reed, Smith, Shaw & McClay
2500 One Liberty Square
Philadelphia, PA 19103
(215) 851-8100

Counsel for Public Utilities Commission of Ohio

ALAN KOHLER
VERONICA A. SMITH
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 783-2810

Counsel for Pennsylvania Public Utility Commission

JAMES B. GAINER
DUANE W. LUCKEY
Lee Fisher, Attorney General of Ohio
180 E. Broad Street
Columbus, OH 43266-0573
(614) 644-4397

Counsel for Public Utilities Commission of Ohio

RICHARD SOLOMON
DAVID D'ALESSANDRO
Morrison & Hecker
1747 Pennsylvania Ave. N.W.
Washington, DC 20006-4604
(202) 785-9100

Counsel for the Public Service Commission of the State of New York

BRYAN G. MOORHOUSE
SUSAN MILLER
6 St. Paul Centre
6th Floor
6 St. Paul Street
Baltimore, MD 21202
(410) 767-8036

Counsel for the Maryland Public Service Commission

(6)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF OF PETITIONER

CARTER G. PHILLIPS *
JAMES F. BENDERNAGEL, JR.
DAVID L. LAWSON
SIDLEY & AUSTIN
1722 I Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Petitioner

* Counsel of Record

January 11, 1994

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TABLE OF AUTHORITIES

CASES

	Page
Begier v. *IRS*, 496 U.S. 53 (1990)	7
Butner v. *United States*, 440 U.S. 48 (1979)	4
City of Milwaukee v. *Illinois*, 451 U.S. 304 (1981)	3
Clearfield Trust Co. v. *United States*, 318 U.S. 363 (1943)	4
Florida Gas Transmission Co., 32 FERC ¶ 61,120 (1985)	9
Hillsborough County v. *Automated Medical Lab., Inc.*, 471 U.S. 707 (1985)	3
In re Iowa R.R., 840 F.2d 535 (7th Cir.), *cert. denied*, 488 U.S. 899 (1988)	2
Kamen v. *Kemper Fin. Servs., Inc.*, 111 S. Ct. 1711 (1991)	4, 6
Miree v. *DeKalb County*, 433 U.S. 25 (1977)	3
Missouri Pac. R.R. v. *Escanaba & L.S. R.R.*, 897 F.2d 210 (6th Cir. 1990)	3
Morgan v. *South Bend Community Sch. Corp.*, 797 F.2d 471 (7th Cir. 1986)	6
NLRB v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112 (1987)	4
O'Melveny & Myers v. *FDIC*, 62 U.S.L.W. 3368 (U.S. Nov. 29, 1993) (No. 93-489)	5
Silver Creek Oil & Gas, Inc., 42 FERC ¶ 62,153 (1988)	9
Sola Elec. Co. v. *Jefferson Elec. Co.*, 317 U.S. 173 (1942)	4
Smith v. *Williams*, 698 F.2d 611 (3d Cir. 1983)	7
Taylor v. *United States*, 495 U.S. 575 (1990)	4
Texas Indus., Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981)	3
Transamerican Natural Gas Corp., 41 FERC ¶ 62,206 (1987)	9
Trice Prod. Co., 32 FERC ¶ 61,191 (1985)	9
United States v. *James*, 478 U.S. 597 (1986)	4
United States v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979)	1, 2
United States v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973)	4
Wallis v. *Pan Am. Petroleum Corp.*, 384 U.S. 63 (1966)	3

TABLE OF AUTHORITIES—Continued

STATUTES	Page
11 U.S.C. § 541(d)	1, 4
OTHER AUTHORITIES	
Black's Law Dictionary (1891)	4
Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947)	4
H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963	4

REPLY BRIEF OF PETITIONER

Desperate to sustain the preferential transfer of more than a hundred million dollars from Columbia Gas Transmission Corporation ("Debtor") to its corporate subsidiaries, respondents attempt the same federal common law sleight of hand embodied in the decision below. They contend that that decision is consistent with previous decisions of this Court and the other courts of appeals, because the Third Circuit properly applied this Court's decision in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), in giving content to *federal* trust and property law. Even if that were true—and, as discussed below, it plainly is not—the appropriate framework for determining the content of federal law, *once it is determined that federal law applies*, is *not* the issue raised by the petition in this case. Rather, the issue presented by the petition is the appropriate framework for determining *when* a federal court sitting in bankruptcy may preempt state property laws in favor of federal law—whatever its content. On that issue respondents are noticeably silent, and on that important and recurring issue there is a clear conflict among the circuits that warrants further review by this Court.

1. As the respondent public utility commissions concede, "[a] federal court's choice between state and federal law has been consistently held to be governed by a two-prong test" under which the court first "must determine whether [it] has *authority* to apply federal law." Joint Brief in Opposition of the State Public Utility Commissions and Consumer Advocate Offices at 9 ("Public Utility Brief") (emphasis added). Respondents do not dispute that the decision below held that merely because a federal statute is involved, federal courts *must* apply federal law to determine what property rights exist under § 541(d) of the Bankruptcy Code, 11 U.S.C. § 541(d). Nor do they deny that in so ruling the Third Circuit authorized federal courts sitting in bankruptcy immediately to launch into the second prong of the federal common law test, namely the *Kimbell Foods* judicial balancing of state and

federal interests—an inquiry that this Court has acknowledged is "a matter of judicial policy" that allows federal courts to act " 'according to their own standards,' " *Kimbell Foods*, 440 U.S. at 727-28, —without first determining that Congress authorized such judicial lawmaking.

Whatever the merit of that approach, it plainly conflicts with the approach of the Seventh Circuit in an identical context—*i.e.*, a dispute under § 541(d) in which putative trust beneficiaries asserted "federal interests" related to a non-bankruptcy federal program as justifying preemption of state trust law. See *In re Iowa R.R.*, 840 F.2d 535 (7th Cir.), *cert. denied*, 488 U.S. 899 (1988). In contrast to the Third Circuit, the Seventh Circuit began by noting that the Bankruptcy Code, far from authorizing federal courts to override state property laws, generally requires application of those laws. *Id.* at 540. The court then observed that in such circumstances federal law can apply only if state law is preempted, which occurs only if there is a "concrete federal interest with which the application of state law would interfere." *Id.* ("[t]o say that there is a federal common law governing interests in funds received by rail carriers is to say that state law is preempted"). Because, as here, the putative trust beneficiaries in *Iowa Railroad* raised only abstract policy arguments, there was no "substantial conflict between state law" and any concrete federal interest. *Id.* Accordingly, the *Iowa Railroad* court *never* reached the *Kimbell Foods* balancing test; instead it held that under the established preemption jurisprudence of this Court state law applied of its own force.[1] Given that the decision below requires every court applying § 541(d)—or, indeed, any federal statute—to engage in the elastic *Kimbell Foods* balancing approach, there is a clear circuit split, and the Sixth Circuit was plainly correct when it described *Iowa Railroad* as "a complete rejection of" the Third Circuit's federal

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[1] The court cited *Kimbell Foods* only for the undisputed proposition that even where federal law *is* authorized, federal courts ordinarily should adopt state law as the federal rule of decision.

common law approach. *Missouri Pac. R.R.* v. *Escanaba & L.S. R.R.*, 897 F.2d 210, 213 (6th Cir. 1990).[2]

2. The Third Circuit's unprecedented expansion of the "narrow areas"[3] that were *automatically* covered by federal law to include *all* private "disputes which relate to a nationwide federal program," Public Utility Brief at 9, undermines this Court's efforts to protect fundamental federalism and democratic process concerns by carefully restricting the scope of federal judicial lawmaking.[4] Indeed, the Third Circuit view that it "is axiomatic that federal law governs questions involving the interpretation of a federal statute," Pet. App. 47a, would render superfluous much of this Court's preemption jurisprudence, which focuses on the language, structure, and purpose of federal statutes to determine whether *Congress* intended to preempt state laws. See, *e.g.*, *Hillsborough County* v.

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[2] Respondents argue that any conflict is unimportant because *Penn Central*, *Lehigh* and *Iowa Railroad* are "limited" to the interline railroad context. No language in any of the relevant decisions supports that proposition. Indeed, the decision below explicitly relied on *Penn Central* and *Lehigh*. *See* Pet. App. 51a ("[t]he same rationale [of *Penn Central* and *Lehigh*] applies here").

[3] *See Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) ("absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases").

[4] *See, e.g., City of Milwaukee* v. *Illinois*, 451 U.S. 304, 312-13 (1981) ("[t]he enactment of a federal rule . . . and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives"); *Miree* v. *DeKalb County*, 433 U.S. 25, 32 (1977) ("the issue of whether to displace state law on an issue such as this is primarily a decision for Congress. Congress has not chosen to do so in this case"); *Wallis* v. *Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966) ("[e]ven where there is related federal legislation in an area, as is true in this instance, it must be remembered that 'Congress acts . . . against the background of the total *corpus juris* of the states").

Automated Medical Lab., Inc., 471 U.S. 707, 715 (1985) (no preemption in areas that traditionally have been regulated by the states "unless that was the clear and manifest purpose of Congress") (internal quotations omitted).[5]

To say that statutory interpretation raises a federal question is only to say that federal principles of statutory construction apply in determining congressional intent. See, *e.g.*, *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987). And, as this Court has previously recognized, "Congress has *generally* left the determination of property rights in the assets of a bankrupt's estate to state law." *Butner* v. *United States*, 440 U.S. 48, 54 (1979) (emphasis added).[6] The decision

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[5] The decision below cites this Court's decision in *Kamen* v. *Kemper Financial Services, Inc.*, 111 S. Ct. 1711 (1991), in support of the view that federal law governs in all cases involving statutory interpretation. Respondents add *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973). Neither case supports that view: the former involved a determination of the contours of a federal cause of action and the latter involved the rights and obligations of the United States itself; both fall squarely within the narrow areas in which it has long been settled that federal law governs. *See, e.g., Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943); *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U.S. 173 (1942).

[6] Of course, "[t]he starting point in statutory interpretation is 'the language [of the statute] itself.'" *United States* v. *James*, 478 U.S. 597, 604 (1986) (second alteration in original). The Bankruptcy Code excludes from the bankruptcy estate property in which the Debtor holds "only legal title and not an equitable interest." 11 U.S.C. § 541(d). Those terms are no more than a restatement of the common-law definition of a trust. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 368 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6324 (section 541(d) covers situations "where property ostensibly belonging to the debtor will actually not be property of the debtor, but will be held in trust for another"). *See also* Black's Law Dictionary 1191 (1891) (defining trust as "[a]n equitable or beneficial right . . . held for the beneficiary by another person, in whom resides the legal title"). And, it is a well established "maxim that a statutory term is generally presumed to have its common-law meaning." *Taylor* v. *United States*, 495 U.S. 575, 592 (1990). *See also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537

below authorizes federal courts, under the guise of statutory interpretation, to ignore congressional intent and to determine in the first instance—through their own balancing of policy interests—whether or not to apply state law.

That holding has broad implications both in the bankruptcy context, where the standardless federal common law of "trusts" threatens to derail the orderly bankruptcy distribution process,[7] and, more generally, by expanding greatly the role of the federal judiciary in determining when federal law should preempt state law. Recognizing the troubling implications of the holding below, respondents go to great lengths to assure the Court that the "Third Circuit's decision is clearly limited to the facts and circumstances of this case and cannot be construed as a general rule of law applicable to all industries." Brief in Opposition for Respondents Cities of Charlottesville, and Richmond, Virginia at 23. However, nothing in the decision below in any way limits the broad federal common law holding.

The importance of that federal common law issue is reflected in the Court's recent grant of certiorari in *O'Melveny & Myers* v. *FDIC*, 62 U.S.L.W. 3368 (U.S. Nov. 29, 1993) (No. 93-489). In *O'Melveny*, the Ninth Circuit preempted state tort law with federal common law in a legal malpractice action brought by the Federal Deposit Insurance Corporation, acting in its capacity as receiver for a failed financial institution. There, as here, the court of appeals justified preemption not by reference to the language, history, structure or purpose of the relevant statutes, but based its decision solely on its own determination that federal policy interests would be advanced by creating federal common law. Because the decision below impermissibly expands the scope of federal judicial lawmaking in the context of a purely *private*

(1947) ("if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it").

[7] *See* Pet. at 17-19.

dispute, it presents an even stronger case for this Court's review than does *O'Melveny*.[8]

3. Even assuming *arguendo* that Congress had authorized federal courts sitting in bankruptcy to apply federal law of property rights, the Third Circuit's approach to giving content to federal law conflicts with previous decisions of this Court and the other courts of appeals. As this Court has repeatedly cautioned, even when Congress has authorized the application of federal law, generally "federal courts should 'incorporat[e] [state law] as the federal rule of decision.'" *Kamen* v. *Kemper Fin. Servs., Inc.*, 111 S. Ct. 1711, 1717 (1991) (quoting *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979)) (alteration in original). The approach of the Third Circuit effectively discards this "presumption that state law should be incorporated into federal common law," *id.*, and the resulting expansion of the lawmaking authority of the federal courts is alone sufficient to justify this Court's review of the decision below. Compare *Morgan* v. *South Bend Community Sch. Corp.*, 797 F.2d 471, 476 (7th Cir. 1986) ("[w]hen it is not necessary to have a national rule, it is necessary not to have one").

Respondents contend that the decision below is not sufficiently important to warrant further review, because the Third Circuit properly refused to incorporate state law principles into federal common law to avoid interference with a federal "goal of getting the refunds into the hands of the gas consuming public." Brief in Opposition for Respondent Official Committee of Customers of Columbia Gas Transmission Corporation at 12. This rationale does not withstand scrutiny and certainly does not justify denying certiorari.

First, by its own admission, the Third Circuit's assumption that it had authority to promulgate federal common law rested entirely on the fact that it was interpreting the *Bankruptcy Code*. In giving content to federal bankruptcy

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[8] At a minimum, the petition for certiorari in this case should be held pending resolution of the federal common law issue in *O'Melveny*.

law, however, the Third Circuit relied exclusively on its understanding of federal policies underlying the *Natural Gas Act*, a statute that does not even address property rights or payments in bankruptcy. Moreover, the federal common law trust "rule" crafted by the Third Circuit is directly contrary to Congress' *bankruptcy* policies of "[e]quality of distribution among creditors," *Begier* v. *IRS*, 496 U.S. 53, 58 (1990), and an orderly *statutory* distribution scheme. Thus, the approach of the Third Circuit authorizes federal courts to roam freely through the vast United States Code in search of "federal policy" —unrelated to, and indeed inconsistent with, federal bankruptcy interests—upon which to justify preferential payment to certain creditors in bankruptcy.

Second, even if the Natural Gas Act were relevant in determining what law should govern property rights determinations pursuant to § 541(d) of the Bankruptcy Code, none of the three *Kimbell Foods* factors—(1) the need for a nationally uniform rule, (2) whether incorporation of state law would frustrate *specific objectives* of the federal program, and (3) whether preemption of state law would upset commercial expectations—remotely justifies displacing the entire corpus of traditional state law trust principles with a purely result-oriented federal common law scheme.[9]

With respect to the first two factors, respondents merely parrot the decision below—a uniform national rule is necessary, they say, to protect them from "the vagaries of state law" and to avoid frustrating the Natural Gas Act's goal of "providing gas to the public at reasonable rates." However, as the Third Circuit itself has previously recognized, common law trust principles *are* uniform throughout the states. See *Smith* v. *Williams*, 698 F.2d 611, 614 (3d Cir. 1983). Moreover, the "uniform national rule"

[9] Respondents' suggest that the Third Circuit merely chose between two existing bodies of trust law—state law and federal common law. This is, of course, incorrect. As explained in the petition, prior to the decision below each of the few decisions applying federal trust law had incorporated state law trust principles.

crafted by the Third Circuit—federal law is whatever is necessary to ensure that gas distribution companies prevail over other creditors—is no rule at all. Thus, the Third Circuit replaced a uniform body of state law trust principles with an *ad hoc* federal determination. It is exactly this type of standardless judicial lawmaking that the incorporation doctrine was designed to prevent.

Nor does holding respondents to the same standards as other creditors frustrate any "specific objective" of the Natural Gas Act. Neither the court below nor any respondent points to *anything* in the language, history or structure of the Natural Gas Act (or in any prior decisions construing it) that in any way suggests that Congress intended to excuse state-regulated gas distribution companies from the state laws that govern property rights determinations in bankruptcy. As explained in the petition, the Natural Gas Act was a carefully crafted legislative solution to a single problem—the exercise of *monopoly power* by interstate pipeline companies that could not be adequately regulated by any single state. See Pet. at 16. Application of state trust and property law here will in no way invite monoply abuse by any pipeline; indeed, the Debtor pipeline *supports* its customers' request for immediate payment. And, contrary to respondents' misleading rhetoric, the fact that the FERC was established and given authority to order refunds to combat monopoly power in no way suggests that Congress also intended in enacting the Natural Gas Act to protect state-regulated gas distribution companies from all other risks faced by commercial entities—including the risk that payments will be delayed or reduced as a result of the bankruptcy of a trading partner.[10]

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[10] Application of state trust laws simply has *no* effect on the FERC's ability to order refunds to combat excessive rates. Although the Debtor's bankruptcy has interrupted the *payment* of its refund obligations—just as it has interrupted payments to thousands of other creditors—payment by bankrupts is a matter clearly controlled by the Bankruptcy Code, not the NGA. Thus, respondents' argument is really that the Bankruptcy Code should not be allowed to interfere with the payment of FERC-ordered

With respect to the third factor, respondents argue in circular fashion that the decision to ignore state-law trust principles cannot have upset commercial expectations, because no creditor could reasonably have expected to lay any claim to the refund monies. That, of course, begs the question. As respondents concede, *if* it was reasonable to assume that state law would apply to trust determinations in bankruptcy, then it was reasonable for the Debtor's creditors to assume that they would have legitimate claims against refund monies in the event of bankruptcy, just as *all* property that did not meet state-law trust requirements would be subject to their claims. And it plainly *was* reasonable to assume that state-law principles would apply to any trust determination in bankruptcy—prior to the decision below, *every* court to address the issue had applied traditional state law principles, either through the application of state law per se or through incorporation of state-law principles into the federal common law.[11]

Finally, Respondents' claim that holding the Debtor's customers to the same standards as all other claimants would produce a "windfall" to the Debtor's general creditors is meritless. On the contrary, all funds in the

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obligations. That is an argument that can only be made to Congress, not to a federal court.

[11] Every relevant FERC decision also supported this view. Respondents criticize petitioner for citing only one such decision, but there are numerous other decisions. *See, e.g., Silver Creek Oil & Gas, Inc.*, 42 FERC ¶ 62,153 (1988); *Transamerican Natural Gas Corp.*, 41 FERC ¶ 62,206, at 63,454 (1987) ("refusal to grant postponement of [the debtor's] refund obligation merely leaves the persons owed . . . refunds in the same position as [the debtor's] other creditors. Disposition of [the debtor's] assets in order to discharge its debts, including . . . refunds, is a matter for the court handling [the debtor's] bankruptcy proceeding"); *Florida Gas Transmission Co.*, 32 FERC ¶ 61,120, at 61,319 (1985) (staying payment of refund obligations "pending termination of [the debtor's] Chapter XI bankruptcy proceeding, unless payment in whole or in part is authorized by the bankruptcy court"); *Trice Prod. Co.*, 32 FERC ¶ 61,191 (1985) (extinguishing refund obligations in light of bankruptcy court's confirmation of reorganization plan).

Debtor's possession are non-trust property of the estate, against which thousands of unsecured creditors have legitimate claims. The *most* that these creditors can hope for is full payment of their legitimate claims, and that is not likely. The customers, by contrast, ask for a *guarantee* of full and immediate payment, despite the fact that they have no stronger ownership claim to the property of the estate than the Debtor's other general creditors. It is pure sophistry to characterize equal treatment of similarly situated parties as a windfall for some; it is respondents who seek a windfall in this case.

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At bottom, the decision below authorizes federal courts to distribute property held by bankrupts based upon no more than a federal court's own balance of the equities of competing claims. Nothing in either the Bankruptcy Code or the Natural Gas Act in any way suggests that Congress intended this radical departure from past law.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. Alternatively, the Court should hold the petition pending the decision in *O'Melveny & Myers* v. *FDIC*, *supra*, and then dispose of the petition as appropriate in light of that decision.

Respectfully submitted,

CARTER G. PHILLIPS *
JAMES F. BENDERNAGEL, JR.
DAVID L. LAWSON
SIDLEY & AUSTIN
1722 I Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Petitioner

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* Counsel of Record